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EDITOR'S NOTE

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no. 84-1656-CFX
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cketed:
April 16, 1985

ee also:
84-1999
85-1085
85-1129

Title: Local 28 of the Sheet Metal Workers' International
Association and Local 28 Joint Apprenticeship
Committee, Petitioners
v.

Equal Employment Opportunity Commission, et al.

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Gold, Martin R.

Counsel for respondent: Solicitor General, Kahn, Lawrence
Stephen, Schwarz Jr., Frederick A.O.,
Sherwood, O. Peter

entry	Date	Note	Proceedings and Orders
1	Apr 16 1985	G	Petition for writ of certiorari filed.
3	May 14 1985		Order extending time to file response to petition until June 21, 1985.
5	May 17 1985		Order extending time to file response to petition until May 31, 1985.
6	May 17 1985		Above extension is for the NY St. Human Rights, et al.
7	May 23 1985		Order further extending time to file response to petition until June 21, 1985.
8	May 23 1985		Above extension is for NY State Human Rights, et al.
9	Jun 18 1985		Order further extending time to file response to petition until July 21, 1985.
10	Jun 18 1985		Above extension is for ALL RESPONDENTS.
11	Jul 24 1985		Brief of respondents EEOC, et al. in opposition filed.
12	Jul 24 1985		DISTRIBUTE, September 30, 1985
13	Jul 22 1985	X	Brief of respondent The City of New York in opposition filed.
14	Aug 8 1985	X	Reply brief of petitioner Local 638, etc., et al. filed.
15	Sep 12 1985	X	Supplemental brief of respondent EEOC filed.
16	Oct 7 1985		Petition GRANTED. The case is set for oral argument in tandem with no. 84-1999, Local No. 93, etc. v. Cleveland. *****
17	Nov 1 1985		Record filed.
18	Nov 1 1985		Certified copy of original record & proceedings, 14 boxes, received.
20	Nov 13 1985		Order extending time to file brief of petitioner on the merits until December 2, 1985.
22	Nov 20 1985		Brief amicus curiae of Pacific Legal Foundation filed.
23	Nov 27 1985		Order further extending time to file brief of petitioner on the merits until December 6, 1985.
24	Dec 2 1985		Brief amicus curiae of Local 542, Internatl. Union of Operating Engineers, et al. filed. VIDED.
25	Dec 6 1985		Joint appendix filed.
26	Dec 6 1985		Brief of petitioners Local 638, etc., et al. filed.
28	Dec 9 1985		Brief of respondents EEOC, et al. filed.
29	Dec 12 1985		Stipulation limiting scope of issues raised by petitioners filed.
32	Dec 20 1985		Order extending time to file brief of respondent on the

Entry	Date	Note	Proceedings and Orders
			merits until January 24, 1986.
5	Dec 20 1985		Above extension applies to all respondents.
6	Dec 19 1985	D	Motion of the Solicitor General for divided argument and for additional time for oral argument filed.
7	Dec 31 1985		Opposition of petitioners to motion of the Solicitor General for divided argument and for additional time for oral argument filed.
8	Jan 3 1986		Opposition of respondents City of New York, et al. to motion of the Solicitor General for divided argument and for additional time for oral argument filed.
9	Jan 3 1986		Brief amicus curiae of Natl. Conference of Black Mayors, Inc. filed. VIDE.
10	Jan 3 1986	D	Motion of North Carolina Association of Black Lawyers for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
11	Jan 3 1986		Brief amicus curiae of NC Assoc. of Black Lawyers filed.
12	Dec 20 1985		DISTRIBUTED, Jan. 10, 1986. (Stipulation limiting scope of issues raised by petitioners).
13	Jan 7 1986		SET FOR ARGUMENT, Tuesday, February 25, 1986. (3rd case)
14	Jan 13 1986		Motion of the Solicitor General for divided argument and for additional time for oral argument DENIED.
15	Jan 13 1986		Motion of North Carolina Association of Black Lawyers for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED. Motion of North Carolina Association of Black Lawyers for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument, or in the alternative motion for appointment of counsel to brief and argue in support of judgment below, as amicus curiae is DENIED.
16	Jan 11 1986		Application of respondent, NY State Div. of Human Rights for leave to file respondent's brief on the merits in excess of the page limitation filed (A-543), and order granting same by Marshall, J., on January 16, 1986.
17	Jan 11 1986		The brief may not exceed 65 pages.
18	Jan 23 1986		Logging received, 2 volumes, titled "Employment Patterns of Minorities...".
19	Jan 24 1986		CIRCULATED.
20	Jan 24 1986	X	Brief amicus curiae of Detroit, et al. filed. VIDE.
21	Jan 23 1986	X	Brief amicus curiae of National Association of Manufacturers filed.
22	Jan 24 1986		Brief amicus curiae of Lawyers' Committee for Civil Rights under Law, et al. filed. VIDE.
23	Jan 25 1986	X	Brief of respondent The City of New York filed.
24	Jan 24 1986	X	Brief amicus curiae of Equal Employment Advisory Council filed.
25	Jan 24 1986	X	Brief amicus curiae of Birmingham, AL filed. VIDE.
26	Jan 24 1986	X	Brief amicus curiae of California, et al. filed. VIDE.
27	Jan 27 1986	X	Brief of respondent NY St. Div. of Human Rights filed.

Entry	Date	Note	Proceedings and Orders
28	Jan 24 1986	X	Brief amicus curiae of NOW Legal Defense, et al. filed. VIDE.
29	Jan 24 1986	X	Brief amicus curiae of NAACP Legal Defense, et al. filed.
30	Feb 11 1986		Application for leave to file a reply brief on the merits in excess of the page limitation filed (A-614) filed.
31	Feb 11 1986		and order granting same by Marshall, J., on February 12, 1986. The brief may not exceed 35 pages.
32	Feb 18 1986	X	Reply brief of petitioners Local 638, etc., et al. filed.
33	Feb 18 1986	X	Reply brief of respondent EEOC filed.
34	Feb 25 1986		ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

84-1656

No.

Supreme Court, U.S.
FILED

APR 16 1985

ALEXANDER J. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL 638 . . . , LOCAL 28 OF THE SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION,
LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

— against — *Petitioners,*

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, THE CITY OF NEW YORK, and NEW
YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

WILLIAM ROTHBERG
POPKIN & ROTHBERG
16 Court Street
Brooklyn, New York 11241
(718) 624-2200

Co-Counsel for Local 28
JAC

EDMUND P. D'ELIA
655 Third Avenue
New York, New York 10017
(212) 697-9895

Co-Counsel for Local 28

MARTIN R. GOLD
(Counsel of Record)

ROBERT P. MULVEY
HOWARD LLOYD WIEDER
GOLD, FARRELL & MARKS
595 Madison Avenue
New York, New York 10022
(212) 935-9200

Attorneys for Petitioners

492 197

QUESTIONS PRESENTED

A divided panel of the United States Court of Appeals for the Second Circuit affirmed orders of the United States District Court for the Southern District of New York which held Petitioners in contempt for violating a Revised Affirmative Action Program and Order (RAAPO) and an Order and Judgment (O&J); imposed substantial monetary fines on Petitioners to establish, as part of the contempt remedy, an Employment, Training, Education and Recruitment Fund to be financed by Petitioners and to be employed solely to benefit nonwhite apprentices and journeymen; adopted an Amended Affirmative Action Plan and Order (AAAPO), which included a race-conscious quota of 29.23% for nonwhite membership in Local 28; and continued the office of the Administrator, which has placed Local 28 and the Joint Apprenticeship Committee ("JAC") under a judicially-imposed receivership.

The questions presented are:

1. After a general finding of discrimination against unidentified persons, may a district court order a race-conscious affirmative action program under Title VII of the Civil Rights Act to benefit nonwhites?
2. May such an affirmative action program include a percentage "goal" for nonwhite membership and a judicial threat that the goal must be met by a specified date?
3. Does the Constitution prohibit such reverse discrimination as a violation of the Equal Protection clause?
4. Does the Constitutional prohibition against Corruption of Blood invalidate such reverse discrimination?
5. Should civil contempt remedies be declared to be illegal criminal contempt remedies imposed without Due Process of law when they include (a) a compensatory component without proof of damage and (b) a coercive component unrelated to the contempt and without an opportunity to purge the contempt?

6. Do findings of discrimination, premised upon improper standards and statistics, followed by findings of contempt of the resulting orders also based upon improper standards and statistics, deprive Petitioners of Due Process of law?

7. Does a district court order appointing an Administrator with day-to-day supervisory powers over the internal affairs of a labor union violate the union's right to self-governance, or exceed the court's power to appoint special masters.

PARTIES

With the exception of the Sheet Metal and Air-Conditioning Contractors' Association of New York City ("Association"), the caption of this petition contains the names of all parties in the Court of Appeals. * The Association is composed of building contractors in New York City who are engaged in sheet metal construction work. Although no claim was made that it engaged in discriminatory practices or policies, the Association was deemed an indispensable party in the original action and was joined as a defendant for purposes of granting complete relief. All contempt sanctions against the Association were reversed by the Court of Appeals, and it does not join in this petition.

* The contempt proceeding in the district court was also brought against 121 individual contractors. Although the district court found that all of them were guilty of contempt, it imposed no sanctions against them. They therefore did not pursue appeals.

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LOCAL 638 . . . , LOCAL 28 OF THE SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION,
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Petitioners,

— against —

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Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioners, Local 28 of the Sheet Metal Workers' International Association and its Joint Apprenticeship Committee ("JAC"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 16, 1985.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals (A-1-52)¹ is officially reported at 753 F.2d 1172 (2d Cir. 1985) and is unofficially

¹ References as to the Appendix to this petition are referred to herein as (A-).

reported at 36 Fair Empl. Prac. Cas. (BNA) 1466 (2d Cir. 1985). Other reported decisions in this case, also included in the Appendix, are as follows: *United States v. Local 638 et al.*, 337 F. Supp. 217 (S.D.N.Y. 1972); *United States v. Local 638 et al.*, 347 F. Supp. 164 (S.D.N.Y. 1972); *United States v. Local 638 et al.*, 347 F. Supp. 169 (S.D.N.Y. 1972); *Equal Employment Opportunity Commission v. Local 638 et al.*, 401 F. Supp. 467 (S.D.N.Y. 1975), *aff'd as modified*, 532 F.2d 821 (2d Cir. 1976) (Feinberg, J., concurring); *Equal Employment Opportunity Commission v. Local 638 et al.*, 421 F. Supp. 603 (S.D.N.Y. 1975); *Equal Employment Opportunity Commission v. Local 638 et al.*, 565 F.2d 31 (2d Cir. 1977) (Meskill, J., dissenting).²

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 16, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, §9, cl. 3 of the United States Constitution provides:

No Bill of Attainder or ex post facto Law shall be passed.

Article III, §3, cl. 2 of the United States Constitution provides:

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall

² Earlier proceedings in the state courts are reported as follows: *State Commission For Human Rights v. Farrell*, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. N.Y. County 1964); *State Commission For Human Rights v. Farrell*, 47 Misc. 2d 244, 262 N.Y.S.2d 526 (Sup. Ct. N.Y. County 1965); *State Commission For Human Rights v. Farrell*, 47 Misc. 2d 799, 263 N.Y.S.2d 250 (Sup. Ct. N.Y. County 1965); *State Commission For Human Rights v. Farrell*, 52 Misc. 2d 936, 277 N.Y.S.2d 287 (Sup. Ct. N.Y. County), *aff'd*, 27 A.D.2d 327, 278 N.Y.S.2d 982 (1st Dep't), *aff'd*, 19 N.Y.2d 974, 228 N.E.2d 691, 281 N.Y.S. 2d 521 (1967).

work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Section 1 of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(g), provides in pertinent part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Section 703(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j), provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account

of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Section 401(a) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401(a) provides in pertinent part:

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection.

STATEMENT OF THE CASE

Summary

Since 1975, Petitioners, a labor union and its joint apprenticeship committee, have been living under an elaborate race-conscious affirmative action program designed to integrate the sheet metal industry in New York. The centerpieces of the program are (1) a nonwhite membership quota of 29%, denominated a "goal", and (2) a court-appointed Administrator (*i.e.* a special master) who governs Petitioners with respect to the program on a daily basis, at their expense. As a result of their failure to meet the goal, Petitioners have now been held in contempt, largely for failing to comply with ministerial provisions of the program. An expanded race-conscious affirmative action program has now been ordered in which fines and

penalties will fund education, training, counselling and financial assistance exclusively for nonwhites. The Administrator continues to govern. Petitioners have been warned by the district court that if the nonwhite membership "goal" is not met by August 31, 1987, they "will face fines that will threaten their very existence." (A-123). A divided panel of the Court of Appeals distinguished and limited this Court's recent decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and affirmed, but stayed its mandate pending this petition.

Facts and Prior Proceedings

Sheet metal workers are skilled artisans who fabricate sheet metal into ducts and conduits to convey heating and air-conditioning through offices and homes. Local 28 is a union affiliated with the Sheet Metal Workers' International Association. The JAC is an apprenticeship committee composed of labor and management representatives which is responsible for managing the Sheet Metal Workers' Apprenticeship Training Program.

In earlier proceedings in the state courts, Local 28 and the JAC were found to have practiced discrimination against minority applicants to the apprenticeship program by engaging in nepotistic practices which gave "some preference to those applicants who are sons or sons-in-law of present or deceased members of the Union." (A-421). In 1971, the United States brought suit against Local 28 and three other unions³ and their JACs alleging that they had violated Title VII by engaging in discriminatory hiring practices regarding the employment of nonwhites.⁴

³ The case was severed as to each of the defendant unions prior to trial and has since been separately litigated.

⁴ The Equal Employment Opportunity Commission was substituted as named plaintiff for the federal government. 532 F.2d at 824 n.2 (A-210). The New York City Commission on Human Rights was granted leave to intervene in the action against Local 28. 347 F. Supp. 164 (S.D.N.Y. 1972). (A-394-401). The New York State Division of Human Rights, initially named as a third-party defendant, realigned itself as a plaintiff. 753 F.2d at 1173. (A-6).

The district court found that Local 28 and the JAC had discriminated against nonwhites in violation of Title VII, largely by following long-established practices of filling positions in the industry with friends and relatives. 401 F. Supp. at 476. (A-330). On August 28, 1975, the court entered an Order and Judgment (the "O & J") (A-300-316), which required Local 28 and the JAC to refrain from discriminatory practices in the future and (a) established a nonwhite membership goal of 29% to be reached by July 1, 1981; (b) appointed a special master, called an Administrator, with broad supervisory powers, who was to propose and implement an affirmative action plan to govern Petitioners' employment practices; (c) required Petitioners to administer "hands-on" nondiscriminatory tests for journeymen; (d) ordered Petitioners to keep extensive records of applicants to the union or apprenticeship program; (e) directed Petitioners to issue temporary work permits on a nondiscriminatory basis; and (f) ordered Petitioners to conduct a publicity campaign to increase nonwhite awareness of employment opportunities within the union.

The Administrator submitted an Affirmative Action Program and Order (AAPO) which established interim annual goals for nonwhite membership in Local 28, detailed the mechanics for the conduct of the testing and apprenticeship programs and set forth elaborate record-keeping requirements for Local 28 and the JAC. AAPO was approved by the district court and substantially affirmed by the Court of Appeals.⁵ 532 F.2d 821 (2d Cir. 1976) (Feinberg, C.J., concurring). (A-207-229).

Thereafter, a Revised Affirmative Action Plan and Order (RAAPO) was entered in 1977. (A-182-206). RAAPO preserved the interim membership goals in AAPO, the detailed testing,

⁵ The Court of Appeals modified the district court's order to the extent it had required that one of the three union representatives to the JAC be replaced by a representative of minority descent and that three nonwhites be admitted to the apprenticeship program for every two whites admitted. The Court held that these remedies constituted quotas of a nature forbidden by Title VII. Judge Feinberg concurred in the result and the disapproval of the racial quotas. He wrote separately to stress the difference between racial quotas and goals, and to note his approval of the 29% figure in the district court order because it was a goal. (A-227-229).

record-keeping and reporting requirements and the mandated publicity campaign program to attract nonwhite applicants. A divided panel of the Second Circuit affirmed RAAPO. 565 F.2d 31 (2d Cir. 1977). (A-160-181).

Judge Meskill dissented (A-169-181) on the ground that the findings of discrimination, which had been approved by the earlier Court of Appeals decision, had been improperly derived from employment statistics which violated this Court's intervening ruling in *Hazelwood School District v. United States*, 433 U.S. 299 (1977). These statistics utilized a population base restricted to New York City as opposed to the wider geographical area from which the union actually attracted applicants, and the findings were in part based upon discriminatory practices which occurred prior to the Civil Rights Act of 1964. Title VII does not apply to acts or practices which occurred prior to its effective date. Judge Meskill concluded that the failure to apply the *Hazelwood* criteria "cast substantial doubt on the existence of illegal discrimination by these unions. . . ." (A-169).

For the next several years, Local 28 and the JAC were governed by the O & J, RAAPO and the day-to-day dictates of the Administrator. The Administrator approved the size of each of more than 60 classes of apprentices, the major entry point into the industry. (A-42). These classes consisted of approximately 45% persons of minority extraction. (A-43). From April 1977 to April 1982, a period of extreme economic distress for the New York Sheet Metal Industry (A-23-24, 46), total nonwhite membership in Local 28 increased from 6.1% to 14.9%, while total membership declined. (A-480).

Despite the substantial increase in nonwhite membership, in April 1982, as the extended July 1982 deadline for reaching the nonwhite membership goal approached, the City and State initiated contempt proceedings against the Petitioners, claiming they had failed to achieve the requisite 29% "goal". (A-441-477).

The contempt proceeding was clearly premised on the failure to meet the requisite percentage of minority membership, which was treated as a quota. Nevertheless, the district court purported

to hold Petitioners in civil contempt for (1) underutilization of the apprenticeship program; (2) failure to conduct the general publicity campaign ordered in RAAPO; (3) adoption of a job protection provision in the collective bargaining agreement that favored older workers during periods of unemployment (older workers' provision); (4) issuance of unauthorized work permits to white workers from sister locals; and (5) failure to maintain and submit certain records and reports. The district court imposed a fine of \$150,000 and assessed costs and attorneys' fees. (A-149-159).

In holding Petitioners in civil contempt, the district court observed that it was not placing primary emphasis on any one of the above violations but "that the collective effect of these violations has been to thwart the achievement of the 29% goal of non-white membership. . . ." (A-155-156).

In April 1983, the City commenced a second contempt proceeding before the Administrator, charging Local 28 and the JAC with violating certain ministerial provisions of the O & J and RAAPO: (1) Local 28's tardy submission of various records; (2) submission of certain inaccurate data by Local 28 and the JAC,* and (3) Local 28's failure to serve the O & J and RAAPO on certain contractors. (A-127-148). No act of racial discrimination was alleged in the second contempt proceeding.

The district court adopted the Administrator's recommendation that Local 28 and the JAC be held in contempt and assessed additional penalties. (A-125-126). On September 1, 1983, the district court issued an order establishing an Employment, Training, Education and Recruitment Fund (the "Fund") (A-113-118), which was "for the purpose of promotion, employment, training, education and recruitment, and shall be used solely for the benefit of nonwhites." (A-114). The Fund was to be financed in part by the \$150,000 levied against Petitioners in the first contempt proceeding, plus additional administrative

* The sum total of the "inaccurate data" enumerated by the Administrator consisted of describing "Kaplan" as a Spanish surname and "Marquez" as a "white" surname. (A-132-133).

expenses and a further fine of \$.02 per hour for each journeyman and apprenticeship hour worked. Its stated purpose is to create a tutorial program, summer jobs, counselling and support services, and financial support solely for nonwhite apprentices and journeymen.

By separate order (A-111-112), the district court adopted an Amended Affirmative Plan and Order (AAAPO) (A-53-107) which altered RAAPO in various ways, including: (1) computerization of records to be monitored by an independent advisor to the Administrator; (2) extension of the Plan's coverage to include merged locals and their JACs; (3) a requirement that one nonwhite apprentice be indentured for each white apprentice; (4) a requirement that contractors employ one apprentice for every four journeymen; and (5) replacement of the apprenticeship testing program by a three-member selection board, with one representative selected each by the court, JAC and the respondents. AAAPPO continues the office of the Administrator. The expenses of the entire affirmative action program, including the fees of the Administrator (at \$150 per hour), his office and administrative expenses, and expenses of the selection board are all to be borne by Petitioners.

AAAPO also adopted a 29.23% nonwhite membership "goal"; the slight change from 29% resulted from the merger of several unions into Local 28. In a separate memorandum and order adopting the 29.23% "goal" (A-119-124), the district court stated that if the Petitioners fail to achieve the percentage by August 31, 1987, they "will face fines that will threaten their very existence." (A-123).

The Court of Appeals affirmed all findings of contempt against Local 28 and the JAC, save one. The exception was the inclusion of the older workers' provision in the collective bargaining agreement, which the court held could not form the basis for contempt because it had never been implemented. Inasmuch as the only contempt finding against the Association was occasioned by its agreement to the older workers' provision, all findings and sanctions entered against it were reversed. The Court affirmed all contempt remedies against Local 28

and the JAC, including the Fund created only to benefit non-whites. The adoption of AAAPPO was similarly affirmed with two modifications. First, AAAPPO's requirement that the JAC indenture whites and nonwhites on a 1:1 ratio was reversed. Second, the court clarified selection board procedures to avoid possible confusion as to whether such procedures can be utilized before the 29.23% nonwhite membership goal is reached.

Judge Winter dissented and voted to reverse AAAPPO and all findings and remedies. He found "that Local 28 had the approval of the administrator for every act it took that affected the number of minority workers entering the sheet metal industry" (A-38); that the 29% "goal" was, in fact, "an inflexible racial quota" which is illegal and unconstitutional (A-38-39); that the only allegation even remotely justifying "the extraordinary sanctions imposed" was the allegation of underutilization of the apprenticeship program over which the Administrator had total control (A-39); that the finding of underutilization was based on a statistical analysis which the entire panel and all parties agreed was erroneous (A-43); that Local 28 has improperly been effectively placed in receivership and denied its right of self-government (A-38, 45); and that the race-conscious contempt remedies are inconsistent with this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and are of "questionable constitutional validity." (A-44, 48).

REASONS FOR GRANTING THE WRIT

Judge Winter, in the opening lines of his dissent, outlined the reasons for this Court to grant certiorari:

This case, which raises sensitive constitutional issues regarding the judicial imposition of racial quotas, controversial questions of statutory interpretation concerning so-called reverse discrimination as a remedy under Title VII, and more mundane yet important legal issues as to the use of the contempt power, divides this court for a third time. *EEOC v. Local 638*, 565 F.2d 31, 37 (2d Cir. 1977) (Meskill J.,

dissenting); *EEOC v. Local 638*, 532 F.2d 821, 833 (2d Cir. 1976) (Feinberg, C. J., concurring).

(A-38).

I

THE COURT SHOULD DETERMINE THE LEGALITY OF COURT-IMPOSED AFFIRMATIVE ACTION PROGRAMS UNDER TITLE VII

In *United Steelworkers of America v. Weber*, 443 U.S. 193, 200 (1979) the Court reserved the issue of "what Title VII requires or . . . what a court might order to remedy a past violation of the Act." It appeared that the issue was resolved in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984). The Court's opinion, written by Justice White, in which Chief Justice Burger, Justice Rehnquist and Justice Powell joined, exhaustively considered section 706(g) of Title VII and its legislative history and held that courts could not order race-conscious quotas or remedies except to make whole actual victims of discrimination. 104 S. Ct. at 2588-90. In a concurring opinion, Justice O'Connor expressed her agreement with this holding. She concluded that judicial remedies for Title VII violations were to be employed "only to prevent future violations and to compensate identified victims of unlawful discrimination," (as was done in *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747 (1976) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-74 (1977)) and that the "District Court had no authority to order the Department to maintain its current racial balance or to provide preferential treatment to blacks." 104 S. Ct. at 2593-94.

Justice Blackmun's dissent, in which Justice Brennan and Justice Marshall joined, also considered the issue fully. Clearly, the Court intended to resolve the issue, but the Courts of Appeals and District Courts which have considered the issue since *Stotts*, including the Court of Appeals in the present case,

have refused to read *Stotts* as precluding race-conscious affirmative action as a judicial remedy under Title VII. *Vanguards of Cleveland v. City of Cleveland*, No. 83-3091 (6th Cir. Jan. 23, 1985) (cf. dissent of Kennedy, C.J.); *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3rd Cir. 1984), cert. denied, 105 S. Ct. 782 (1985); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1360 n. 5 (9th Cir. 1984). *Deveraux v. Geary*, 596 F. Supp. 1481 (D. Mass. 1984). These cases restrict *Stotts* to situations involving *bona fide* seniority plans.

The majority opinion below limits *Stotts* even more severely. The blatantly race-conscious program judicially imposed since 1975, the Fund order providing benefits solely to non-whites, and the nonwhite membership "goal" compelling Petitioners to discriminate against whites or "face fines that will threaten their very existence" cannot be justified under Justice White's analysis. Nor can Judge Pratt's three-pronged attempt to distinguish *Stotts* withstand scrutiny. It is an unfair reading of *Stotts* to limit it to *bona fide* seniority plans, "make whole" as opposed to prospective relief, and cases where there has been no finding of intent to discriminate. (A-30-31).

This Court should grant certiorari to resolve the issue of whether *Stotts* is limited as the Court of Appeals held below. The present case squarely raises the issue. The legality of the O & J and RAAPO are before the Court because Petitioners have now been held in contempt for alleged noncompliance with these decrees.⁷

AAAPO and the Fund Order raise the issue directly. These decrees cannot be justified as civil contempt remedies, the permissible breadth of which they vastly exceed. (See Point III,

⁷ A contempt proceeding requires consideration of the legality of the underlying order. *United States v. United Mine Workers*, 330 U.S. 258 (1947); *National Maritime Union v. Aquaslide 'N' Dive Corp.*, 737 F.2d 1395 (5th Cir. 1984); *Ager v. Jane C. Stormont Hospital & Training, Inc.*, 622 F.2d 496 (10th Cir. 1980); *Latrobe Steel Co. v. United Steelworkers of America*, 545 F.2d 1336 (3rd Cir. 1976).

infra). As the entire panel of the Court of Appeals recognized, they can be justified, if at all, only as Title VII remedies.

This case is of great national importance because the determination of this issue will have enormous impact on the numerous court-imposed plans presently in effect. See, e.g., *Chisholm v. United States Postal Service*, 665 F. 2d 482 (4th Cir. 1981); *United States v. City of Buffalo*, 633 F.2d 643 (2d Cir. 1980).

Regardless of whether this Court intended the limited reading of *Stotts* which the majority in the Court below adopted, this petition for certiorari should be granted. If the important issue of whether district courts may impose race-conscious plans under Title VII was not decided by *Stotts*, it should be decided in this case. If the Court were to determine that such remedies may be imposed, the guidelines for such orders should be addressed. In the present case the decrees far exceed the bounds which this Court has fixed for voluntarily-adopted affirmative action programs,⁸ and violate the Congressional prohibition against employers granting preferential treatment to any group on the basis of a racial imbalance. Title VII, Section 703(j), 42 U.S.C. §2000e-2(j).

II

THE FUND ORDER AND AAAPPO VIOLATE THE CONSTITUTION

A. Equal Protection of the Law

The Due Process clause of the Fifth Amendment imposes the equal protection limitations of the Fourteenth Amendment on actions of the federal government and its agencies, including judicial orders, and prohibits the federal government from

⁸ *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) adopted a three-pronged test for voluntarily-adopted plans. (1) They must be "specifically designed to break down patterns of racial discrimination"; (2) they must not "unnecessarily trammel" the rights of whites; and (3) they must be temporary.

discriminating between individuals or groups. *Washington v. Davis*, 426 U.S. 229 (1976); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n. 3 (1975); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *National Black Police Association, Inc. v. Velde*, 712 F.2d 569 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2180 (1984).⁹

The race-conscious quota in AAAPPO and the race-conscious Fund order deny equal protection of the law to present and future white members of the union and white applicants to the apprenticeship program by mandating benefits solely to nonwhites. The nonwhites benefiting from the program are not identifiable victims of past discrimination, and the whites discriminated against by the program are not persons who practiced discrimination.¹⁰

AAAPPO requires the Petitioners to achieve a racial balance of 29.23% nonwhite members by 1987, and the court has threatened them with dire consequences if the percentage is not realized. (A-123). In affirming the O & J in 1976, the majority opinion of the Court of Appeals acknowledged that in practice the mathematical membership goal would require Petitioners to exclude whites from membership solely on the basis of race. 532 F.2d at 827. (A-216). The Court of Appeals held that such reverse discrimination was permissible.

In the Court of Appeals decision to which this petition is addressed, the majority simply states its conclusion that the race-conscious program does not violate the Constitution. (A-29). Its only authority is its own decision in *Rios v. Enterprise Association of Steamfitters Local 638*, 501 F.2d 622, 629-31 (2d Cir. 1974), which itself contains no reasoned discussion of the issue. The majority ignores the fact that Petitioners will obviously be

⁹ Equal protection analysis under the Due Process Clause of the Fifth Amendment is the same as under the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

¹⁰ Judge Winter observed in his dissent that the Fund order has the effect of holding "Local 28 responsible for improving the quality of public education in New York." 753 F.2d at 1195. (A-50).

required to engage in overt reverse discrimination to meet the nonwhite membership "goal" mandated by the district court.

As Judge Winter states in dissent, the orders of the district court are of "questionable constitutional validity. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 287-320 (1978) (opinion of Powell, J.)." (A-48). In *Bakke*, Justice Powell delivered the opinion of the Court for less than a majority. In his learned discussion of the application of the equal protection clause to affirmative action programs, he concludes that strict racial quotas and other broad racial benefits constitute unconstitutional reverse discrimination unless tailored to make whole identified victims of past discrimination, in a manner which has clearly not occurred here.

The Court should grant certiorari to address the application of the equal protection clause to the orders of the district court.

B. Corruption of Blood

The construction of Title VII adopted by the Court of Appeals has the effect of making the Civil Rights Act an unconstitutional bill of attainder. The reverse discriminatory impact on innocent white workers occasioned by AAAPPO and the Fund order visits upon them the sins of past discrimination by others. This construction of Title VII is contrary to basic principles of individual accountability, and is specifically outlawed by the prohibition against bills of attainder and corruption of blood contained in art. I, §9, cl. 3 of the Constitution.

Bills of attainder punish either named individuals or classes of persons, without judicial proceedings. The practice of "corruption of blood," abolished by art. III, §3, cl. 2, continued the punishment to the heirs of the person attainted. This Court has repeatedly voiced its objection to such discriminatory legislation. *County of Oneida v. Oneida Indian Nation of New York*, 53 U.S.L.W. 4225, 4238 (U.S. Mar. 5, 1985) (Stevens, J. dissenting) ("The Framers recognized that no one ought to be condemned for his forefathers misdeeds . . ."); *Korematsu v. United States*, 323 U.S. 214, 243 (1944) (Jackson, J. dissenting)

(" . . . if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.") Guided by these fundamentals of our jurisprudence, the Court has declared unconstitutional legislation that abridged the rights of identifiable classes of individuals to employment. *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Lovett*, 328 U.S. 303 (1946).

The Court should grant certiorari to address the dimensions of these constitutional rights and their application to the Civil Rights Act.

III

THE SANCTIONS IMPOSED EMASCULATE THE DIFFERENCE BETWEEN CIVIL AND CRIMINAL CONTEMPT AND DENY DUE PROCESS TO PETITIONERS

Judicial sanctions for civil contempt are wholly remedial and may be imposed only to compel compliance with prior orders of the court or to compensate the complaining party for actual losses proved to have been suffered by him. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1947); *Penfield Co. of California v. S.E.C.*, 330 U.S. 585 (1947). Contempt remedies which are punitive in nature may be imposed only in a criminal contempt proceeding, *Nye v. United States*, 313 U.S. 33 (1941), brought under Rule 42, Fed. R. Crim. P., in which the defendant is afforded the protections of Due Process applicable to criminal proceedings. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

The entire panel in the Court of Appeals agreed, and all parties concede, that such procedures were not followed in this case. (A-25). The remedies must thus be justified as sanctions for civil contempt, or they cannot be upheld.¹¹

¹¹ Alternatively, Respondents may argue, certain provisions could be justified as remedies under Title VII. See Point I, *supra*.

In upholding the remedies imposed here, the majority paid lip service to the standards enumerated above, but so departed from their application as to emasculate the differences between civil and criminal contempt and sustain criminal sanctions against the Petitioners without Due Process. In addition, the Court of Appeals has created a precedent with potential broad applicability which departs from well-settled principles.

The Court of Appeals misconstrued the nature of compensatory civil contempt remedies, and then clearly implied that if the sanctions imposed can be said to have compensatory or coercive "components", then the inquiry ends without even examining other aspects of the penalty which have neither feature.

The fines imposed here are to be used to provide tutorial, counselling and financial support for nonwhites. The majority approved these fines as a compensatory civil contempt remedy despite the fact that no proof was presented that any identifiable person was damaged. Indeed, no proof of damage of any kind was offered.

The "coercive component" found by the Court of Appeals suffers from a similar infirmity. The orders continue until the 29.23% nonwhite membership "goal" is reached, which the Court of Appeals found provided Petitioners with the requisite opportunity to purge themselves of the contempt. But the contempt was purportedly not based on Petitioners' failure to meet the "goal".¹² Thus a civil contempt remedy which coerces them to reach the "goal" is a gross departure from settled principles of civil contempt remedies.

In actuality, Petitioners have been punished criminally without the procedural requirements of such a proceeding, and thus without Due Process. This Court should grant certiorari to restate the principles of civil contempt.

¹² In his dissent, Judge Winter reasons with compelling logic that petitioners were in reality held in contempt solely for their failure to meet the 29% racial quota. (A-38-48).

IV

THE DISTRICT COURT'S USE OF STATISTICAL EVIDENCE VIOLATED TITLE VII AND DUE PROCESS

The district court's 1975 finding that petitioners violated the Civil Rights Law is the underpinning for all the proceedings which have followed. Two years later, this Court decided *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and held: (1) events which predated the Civil Rights Act could not be used as evidence of the Act's violation; and (2) proof of a pattern of discrimination by statistical evidence must be logically consistent and must be drawn from relevant geographical locations. The original district court decision in the present case violated both of these requirements. This departure was the basis for Judge Meskill's dissent from the court's affirmance of RAAPO. Inasmuch as Petitioners have now been held in contempt for violating the O & J and RAAPO, the propriety of the evidence upon which they were based is ripe for review by this Court.

The misuse of statistics was repeated, and thus compounded, in the 1982 contempt finding. Proof of the only charge which could be construed as a discriminatory practice, the underutilization of the apprentice program, was based upon statistics which all parties and the entire panel of the Court of Appeals agree were misunderstood by the district court. (A-15-16). The majority below overlooked this failure by stating that other facts substantiated the finding, which they do not.¹³

The facts are logically analyzed in Judge Winter's dissent. (A-38-52). As he demonstrates, the proof concerning underutilization of the apprentice program is additionally deficient. It overlooks the role of the Administrator who has final authority with respect to the utilization of the apprentice program, and who approved each new class of apprentices.

¹³ Thus, for example, the percentage of unemployed apprentices had dropped to 0% by 1981, the time when it is claimed they were not being utilized. Clearly, they were utilized fully.

This Court should review the procedures followed by the district court in drawing conclusions from statistics without carefully considering "... all of the surrounding facts and circumstances." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977), including whether acts approved by the Administrator can be contemptuous.

V

THE OFFICE OF ADMINISTRATOR CONSTITUTES UNJUSTIFIED INTERFERENCE WITH THE RIGHT OF SELF-GOVERNMENT

AAAPO continues the office of the special master, called an Administrator, originally appointed in the O & J, with broad supervisory powers over Petitioners' compliance with the affirmative action plan. Thus, with respect to key elements of its internal affairs — hiring and employment — Petitioners have been placed under what Judge Winter characterized as a receivership. (A-38, 45). This infringement of the union's statutory right of self-government began in 1975 and will continue until August 1987.

The Court should grant certiorari to consider the extent of judicial power to interfere with the internal management of a union as a part of the remedial action ordered under Title VII of the Civil Rights Act. The issue was addressed by the Court of Appeals in 1976 on appeal from the O & J (532 F.2d at 829). (A-220). It then approved the suspension of self-government as "necessary", with little discussion and without citation of authority. In its decision to which this petition is addressed, the Court of Appeals again considered the issue and adhered to its earlier position.

The appointment and continuation of the Administrator possessed with broad powers "to exercise day-to-day oversight of the union's affairs" (A-220) constitutes an unwarranted denial of the union's right to self-governance Congressionally protected by Section 401(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401(a). Cf. *Local No. 82*,

Furniture & Piano Moving, etc. v. Crowley, 104 S. Ct. 2557 (1984). Before approving an order which abridges this right, a court should be required to find that enforcement of its orders by use of traditional remedies is unavailing.

Rule 53, Fed. R. Civ. P., empowers the court, in exceptional circumstances, to appoint a special master to ensure compliance with its orders. The text of Rule 53(b), however, counsels restraint in the use of a special master: "A reference to a master shall be the exception and not the rule", *accord, Mathews v. Weber*, 423 U.S. 261, 272 (1976), and this Court has employed the extraordinary remedy of mandamus to vacate improvident references to a special master. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256-57 (1957).¹⁴

The Court should grant certiorari to review this judicial intrusion in the internal affairs of a union.

CONCLUSION

A decade ago, petitioners were found to have violated Title VII of the Civil Rights Act, largely on the basis of statistical evidence of a kind which has since been disallowed. A well-intentioned but ill-conceived series of orders and judgments are all hinged upon this questionable finding. Petitioners have been ordered to comply with racial quotas under penalty of extinction; ordered to fund and administer a blatantly race-conscious affirmative action program; been adjudicated in contempt on the basis of evidence which does not withstand scrutiny; been subjected to civil contempt penalties which deny Due Process because they are in reality criminal penalties; have endured an unjustifiable denial of self-government; and have been subjected to the daily interference of a court-appointed Administrator.

¹⁴ See also *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 54 (1981) (White, J. dissenting in part) ("In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed"). In its subsequent opinion in *Pennhurst*, 104 S. Ct. 900, 906 (1984), this Court reserved decision on the propriety of the order appointing the special master as it may have violated principles of comity.

Throughout this decade, it has never been shown that Petitioners have discriminated against even one identifiable person, or that the purposes of the Civil Rights Act could not have been achieved by a simple injunction.

Moreover, the end is not in sight. There is no apparent course of action which Petitioners could follow which would end the judicial interference, the endless litigation and the great financial drain.

This Court should grant certiorari, vindicate Petitioners' rights, and fix the rules so that the numerous civil rights proceedings brought throughout the nation do not result in similar departures from the law and the Constitution, and cause many others the loss of basic freedoms.

Dated: New York, New York
April 16, 1985

Respectfully submitted,

WILLIAM ROTHBERG
POPKIN & ROTHBERG
16 Court Street
Brooklyn, New York 11241
(718) 624-2200
Co-Counsel for Local 28
JAC

EDMUND P. D'ELIA
635 Third Avenue
New York, New York 10017
(212) 697-9895

Co-Counsel for Local 28

MARTIN R. GOLD
(Counsel of Record)
ROBERT P. MULVEY
HOWARD LLOYD WIEDER
GOLD, FARRELL & MARKS
595 Madison Avenue
New York, New York 10022
(212) 935-9200
Attorneys for Petitioners

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1106, 1107, 1108, 1109, 1110, 1111 — Aug. Term 1983

(Argued: April 13, 1984 Decided: January 16, 1985)

Docket Nos. 82-6241, 82-6243, 83-6353, 83-6357,
83-6295, 83-6299

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,
and THE CITY OF NEW YORK,
Plaintiff-Appellee-Cross-Appellant,
—against—

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT AP-
PRENTICESHIP . . . , SHEET METAL AND AIR-CONDI-
TIONING CONTRACTORS' ASSOCIATION OF NEW YORK
CITY, INC.,
Defendants-Appellants-Cross-Appellees.

LOCAL 28,
Third-Party Plaintiff,
—against—

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Third-Party Defendant-Plaintiff-Appellee.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,
Fourth-Party Plaintiff,

—against—

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Fourth-Party Defendant.

Before:

MANSFIELD, WINTER, and PRATT, *Circuit Judges.*

Appeal from several orders of the United States District Court for the Southern District of New York, granted by the late Judge Henry F. Werker, finding defendants in contempt of court, imposing both compensatory and coercive fines, and adopting an amended affirmative action plan to govern defendants' employment practices. Cross-appeal by plaintiff City of New York from an order establishing for defendant union a non-white membership goal of 29.23%.

Affirmed in part, reversed in part, and remanded for proceedings consistent with the opinion. Judge Winter dissents in a separate opinion.

OTTO V. OBERMAIER, New York, NY (Ronald C. Minkoff, Obermaier, Morvillo & Abramowitz, Edmund P. D'Elia, NY, NY; William Rothberg, Brooklyn, NY, of Counsel), *for Defendants-Appellants-Cross-Appellees Local 28 and Local 28 Joint Apprenticeship Committee.*

MARTIN R. GOLD, New York, NY (Jane G. Stevens, Deborah Sherman, Gold, Farrell, & Marks, NY, NY; William Rothberg, Brooklyn, NY, of Counsel), *for Defendant-Appellant Sheet Metal and Air Conditioning Contractors' Association of New York City, Inc.*

SHEILA ABDUS-SALAAM, New York, NY, Assistant Attorney General of the State of New York (Robert Abrams, Attorney General of the State of New York, Rosemarie Rhodes, Allen D. Aviles, Assistant Attorneys General, NY, NY, of Counsel), *for Plaintiff-Appellee State Division of Human Rights.*

CHARLES R. FOY, New York, NY (Frederick A. O. Schwarz, Jr., Corporation Counsel, Francis Caputo, NY, NY, of Counsel), *for Plaintiff-Appellee-Cross-Appellant City of New York.*

WARREN BO DUPLINSKY, Attorney, Equal Employment Opportunity Commission, Washington, DC (David L. Slate, General Counsel, Philip B. Sklover, Associate General Counsel, Barbara Lipsky, Acting Assistant General Counsel, Equal Employment Opportunity Commission, Washington, DC, of Counsel), *for Plaintiff-Appellee Equal Employment Opportunity Commission.*

PRATT, *Circuit Judge:*

Defendants, Local 28 of the Sheet Metal Workers' International Association (Local 28), the Local 28 Joint

Apprenticeship Committee (JAC), and the Sheet Metal and Air Conditioning Contractors' Association of New York City (contractors' association) appeal from several orders of the United States District Court for the Southern District of New York, granted by the late Henry F. Werker, *Judge*, which (1) held all defendants in contempt of court for violating numerous provisions of the Revised Affirmative Action Program and Order (RAAPO) governing defendants' employment practices relating to non-whites (black and Spanish-surnamed workers); (2) imposed both compensatory and coercive contempt fines to be used to fund supplemental training for nonwhite apprentices; and (3) adopted a new Amended Affirmative Action Plan and Order (AAAPO) proposed by plaintiffs. The City of New York (city) cross-appeals from an order, incorporated in AAAPPO, establishing a temporary non-white membership goal for Local 28 of 29.23%. As to Local 28 and the JAC, we affirm all but one of the contempt findings and all of the sanctions ordered below; as to the contractors' association, we reverse the only contempt finding attributable to it, and reverse the award of administrative expenses, costs, and attorneys fees against it. We also affirm, with two modifications, the AAAPPO entered by the district court. Because Judge Werker's findings with regard to the membership goal contained in AAAPPO were not clearly erroneous, we affirm the cross-appeal.

These appeals and cross-appeal arise from yet another attempt to force Local 28 and its JAC to correct the discriminatory practices they have used to keep nonwhites out of Local 28. As we have stated before, "Local 28 and the JAC are no strangers to the courts", *EEOC v. Local 638*, 532 F.2d 821, 824 (2d Cir. 1976), and for a more complete history of this protracted struggle we refer

the uninitiated reader to the many earlier opinions dealing with these defendants. *E.g.*, *State Commission for Human Rights v. Farrell*, 43 Misc. 2d 958 (New York Cty. 1964); *State Commission of Human Rights v. Farrell*, 47 Misc. 2d 244 (New York Cty. 1965); *State Commission of Human Rights v. Farrell*, 52 Misc. 2d 936 (New York Cty. 1967), *aff'd*, 27 A.D.2d 327 (1st Dep't), *aff'd*, 19 N.Y.2d 974 (1967); *United States v. Local 638, Enterprise Association, etc.*, 347 F. Supp. 164 (S.D.N.Y. 1972); *EEOC v. Local 638*, 401 F. Supp. 467 (S.D.N.Y. 1975), *aff'd as modified*, 532 F.2d 821 (2d Cir. 1976); *EEOC v. Local 638*, 421 F. Supp. 603 (S.D.N.Y. 1975); *EEOC v. Local 638*, 565 F.2d 31 (2d Cir. 1977).

I. BACKGROUND

Local 28 is a union composed of workers who perform sheet metal work in the New York metropolitan area. At the time this litigation was instituted Local 28 represented sheet metal workers only in New York City; but in 1981 it merged with several of its sister locals and now represents sheet metal workers in New York City, in Nassau and Suffolk counties in New York State, and in Essex, Passaic, Hudson, and Bergen counties in New Jersey.

The JAC is a management-labor committee responsible for operating the Sheet Metal Work Apprenticeship Training Program (apprenticeship program), a four-year program designed to teach sheet metal skills. A student entering the apprenticeship program is indentured, and upon graduation becomes a journeyman.

The contractors' association, as its name implies, is a trade association of building contractors who perform

sheet metal work in New York City. Although not named in the original complaint, the contractors' association was joined by the court to permit complete relief. *EEOC v. Local 638*, 532 F.2d at 824 n.3.

A. *Prior Proceedings.*

This action was instituted in 1971 by the United States Department of Justice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982), against Local 28 and the JAC to enjoin a pattern and practice of discrimination against nonwhites. Shortly thereafter, the Equal Employment Opportunity Commission (EEOC) was substituted as plaintiff, the city intervened as a plaintiff, and the New York State Division of Human Rights (state), initially named as a third-party defendant, realigned itself with the EEOC and the city. After a three-week trial in 1975, Judge Werker found that Local 28 and the JAC had purposefully discriminated against nonwhites in violation of Title VII. *EEOC v. Local 638*, 401 F. Supp. at 486.

The district court found that the discriminatory methods used by Local 28 and the JAC effectively obstructed every route that nonwhites might use to gain admission to the union. There are four ways to become a member of the local: (1) graduation from the apprenticeship program; (2) successful performance on a journeyman's examination; (3) transfer from a sister local; and (4) organization of nonunion shops coupled with certification of both employer need and worker ability.

Judge Werker found that a majority of Local 28's members were admitted through the apprenticeship program. He further found that entry of nonwhites into

that program had been blocked by the JAC and Local 28 by using invalid entrance exams, by requiring that applicants possess a high school diploma, and by inquiring into applicants' arrest records. Significantly, Judge Werker also noted that proof of the plaintiffs' case was made extremely difficult because the union refused to keep records showing each applicant's race and national origin as required by EEOC regulations.

Judge Werker further found that the local had impeded the other avenues of entry into the union by using invalid journeymen's examinations, by refusing to accept nonwhite transfers from sister locals while issuing temporary work permits primarily to white workers, and by selectively organizing only those shops having a high percentage of white employees. *Id.* at 476-87. In July 1975 Judge Werker entered an order and judgment (O&J) which not only prohibited the defendants from discriminating against nonwhites seeking union membership, but also (a) appointed a special master, called an "administrator", to propose and implement an affirmative action plan to govern defendants' employment practices; (b) established a nonwhite union membership goal of 29% to be reached by July 1, 1981; (c) directed defendants to administer a nondiscriminatory "hands-on" journeymen's examination at least once a year; (d) directed defendants to issue temporary work permits on a nondiscriminatory basis; and (e) ordered defendants to conduct a publicity campaign designed to increase nonwhite awareness of employment opportunities in the union. *Id.* at 489-90.

On appeal, we affirmed Judge Werker's finding that Local 28 and the JAC had intentionally violated Title VII, but reversed two provisions of the relief ordered in the

O&J and in the Affirmative Action Plan and Order (AAPO), which was adopted by the district court during the pendency of the appeal from the O&J. *EEOC v. Local 638*, 532 F.2d at 833. After remand, Judge Werker adopted a Revised Affirmative Action Plan and Order (RAAPO) to reflect the modifications this court made to the O&J and AAPO. We subsequently approved RAAPO. *EEOC v. Local 638*, 565 F.2d at 36.

Generally, RAAPO incorporated the provisions of the O&J. It also established intermediate nonwhite membership goals in order to accomplish the ultimate 29% goal, and ordered defendants to develop the apprenticeship program, to increase and maintain nonwhite enrollment, to maintain detailed records regarding union employment practices, and to submit periodic reports summarizing those records.

B. *The Contempt Proceedings and AAPO.*

On April 16, 1982, the city and state moved in the district court for an order holding Local 28, the JAC, the contractors' association, and 121 contractors in contempt for failing to comply with the O&J, RAAPO, and two orders of the administrator. Specifically, plaintiffs alleged that defendants had violated the O&J and RAAPO by not achieving the 29% nonwhite membership goal by July 1, 1982, and that the failure was due to defendants' numerous violations of the district court's orders. Defendants cross-moved to terminate both the O&J and RAAPO. A hearing was held on June 10, 1982, at which both sides submitted voluminous exhibits and live testimony to detail how the O&J and RAAPO had operated over the previous six years.

In August 1982 Judge Werker held defendants in civil contempt. Although nonwhite membership in Local 28 was only 10.8% at the time of the hearing, he did not rest his contempt finding on failure to meet the 29% membership goal by the date ordered in RAAPO. Instead, he found that defendants had "failed to comply with RAAPO * * * almost from its date of entry". Specifically, Judge Werker found that "[five] separate actions or omissions on the part of the defendants have impeded the entry of non-whites into Local 28 in contravention of the prior orders of this court." Those five were (1) adoption of a policy of underutilizing the apprenticeship program to the detriment of nonwhites; (2) refusal to conduct the general publicity campaign ordered in RAAPO; (3) adoption of a job protection provision in their collective bargaining agreement that favored older workers and discriminated against nonwhites (older workers' provision); (4) issuance of unauthorized work permits to white workers from sister locals; and (5) failure to maintain and submit the records and reports required by RAAPO, the O&J, and the administrator. After discussing these points Judge Werker concluded: "Based on the foregoing violations of the orders of the court and the Administrator, I have no other recourse but to hold the defendants in civil contempt of court." He did so "without placing primary emphasis on any one of the violations of the RAAPO and O&J", and he noted, "I am convinced that the collective effect of these violations has been to thwart the achievement of the 29 percent goal of non-white membership in Local 28 established by the court in 1975."

"[T]o remedy the past noncompliance of the defendants", Judge Werker imposed a fine of \$150,000 to be

placed in a training fund to be used to increase nonwhite membership in the apprenticeship program and, ultimately, in Local 28. The court directed the administrator to develop a plan detailing the purposes, funding, and operation of the training fund. Finally, the court denied defendants' cross-motion to terminate the O&J and RAAPO.

On April 11, 1983, the city brought a second contempt proceeding, this time before the administrator, charging Local 28 and the JAC with additional violations of the O&J and RAAPO, as well as orders of the administrator. By the conclusion of the hearing these charges were distilled into three categories: (1) Local 28's failure to provide the records required by the O&J and RAAPO in a timely fashion; (2) failure by both Local 28 and JAC to provide data that was accurate, and (3) Local 28's failure to serve the O&J and RAAPO on the contractors who hired Local 28's members. After a hearing, the administrator found that plaintiffs had proved the alleged violations, and he recommended that defendants again be held in civil contempt. The remedy suggested by the administrator was that defendants should pay for a computerized recordkeeping system to be maintained by outside consultants and that they should make further contributions to the training fund whose details were still under consideration.

After reviewing the arguments of the parties, the record of the hearing held before the administrator, and the objections to the findings of the administrator, Judge Werker adopted the recommendation that Local 28 and the JAC be held in civil contempt for the additional violations. He deferred ruling on the amount of fines to be imposed until the administrator could submit his recom-

mendations regarding the training fund, but he immediately ordered the JAC and Local 28 to pay the cost of outside consultants to monitor computerization of the local's records.

In September 1983 Judge Werker entered two more orders. One adopted the administrator's proposal to establish an Employment, Training, Education and Recruitment Fund (the fund). The other adopted the Amended Affirmative Action Plan and Order (AAAPO) proposed by the plaintiffs and the administrator.

The training fund was to consist of the \$150,000 fine imposed in the first contempt proceeding, as well as the additional fines imposed on the local and the JAC in the second contempt proceeding. These additional fines required Local 28 to contribute \$.02 per hour for each journeyman and apprentice hour worked, and further required the contractors' association and the JAC, jointly, to pay the fund's administrative expenses. The general purpose of the fund was to compensate for defendants' underutilization of the apprenticeship program by encouraging the participation of nonwhites.

Its immediate objectives were: (1) to create a pool of qualified nonwhite applicants for future apprenticeship programs; (2) to provide counseling and support services to nonwhite apprentices; (3) to provide financial support for out-of-work nonwhite journeymen to encourage them to stay in the trade and to upgrade their skills; (4) to provide financial support to any employer who cannot afford to hire additional apprentices to meet the ratio of one apprentice to every four journeymen required by the court; and (5) to provide incentive or matching funds to attract additional governmental or private job training

programs. The fund order also provided that the fund would terminate when the membership goal set out in AAAPPO was achieved, and that any monies then remaining in the fund contributed by defendants would be returned to them.

AAAPPO makes six significant changes to RAAPO: first, the records subject to the reporting requirements are to be computerized by the defendants and monitored by an independent advisor to the administrator; second, it extends its coverage to include the merged locals and their JACs; third, it requires that one nonwhite apprentice be indentured for every white apprentice; fourth, it requires that the contractors employ one apprentice for every four journeymen employed; fifth, it eliminates the administration of an apprenticeship aptitude examination and substitutes a selection board composed of three members, with one representative each chosen by the court, by the defendants, and by the plaintiffs; and sixth, it establishes a nonwhite membership goal of 29.23% to be achieved by July 31, 1987.

Local 28 and the JAC have appealed from all of the district court's contempt orders as well as its order adopting AAAPPO. The contractors' association has appealed from the district court's first contempt order, and from the order establishing the fund. The city has cross-appealed from that part of AAAPPO that establishes 29.23% as the new nonwhite membership goal, contending that the percentage should be higher. Defendants have not appealed from the denial of their cross-motion to terminate the O&J and RAAPO.

II. DISCUSSION

A. *Liability for Contempt.*

It is well settled in this circuit that a party may be held in civil contempt for failure to comply with an order of the court if the order being enforced is "clear and unambiguous, the proof of noncompliance is 'clear and convincing,'" and the defendants have not "been reasonably diligent and energetic in attempting to accomplish what was ordered." *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir.) (citations omitted), *cert. denied*, 454 U.S. 832 (1981). It is not necessary to show that defendants disobeyed the district court's orders willfully. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Donovan v. Sovereign Security Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984).

When we previously reviewed the district court's 1975 O&J and RAAPO, we affirmed the general provisions of each. *EEOC v. Local 638*, 565 F.2d at 31. After re-examining the specific provisions of those orders that defendants are now charged with violating, we are satisfied that they are clear and unambiguous. Indeed, defendants do not even claim that the burdens imposed by the O&J and RAAPO were unclear; instead they offer other defenses to excuse their admitted noncompliance.

1. *Challenges to the First Contempt Proceeding.*

As to those findings in the first contempt proceeding that relate to the issuance of unauthorized work permits, failure to propose and conduct a general publicity campaign, adoption of the older workers' provision, and the record keeping violations, Local 28 and the JAC virtually concede the facts showing those violations, but offer three

arguments to excuse their noncompliance. They first argue that, under ¶ 41(a) of RAAPO, the disputes about unauthorized work permits and failure to conduct the general publicity campaign have been resolved before the administrator and thus are moot. Next, again relying on ¶ 41(a), they argue that plaintiffs failed to complain to the administrator about the older workers' provision and the recordkeeping violations, and were thus barred from doing so after 30 days. Finally, as an alternative, they argue that laches should bar plaintiffs from complaining about any of these four violations. Not one of these arguments has merit.

Our examination of the record convinces us that defendants' disputes with plaintiffs and the administrator, with regard to the general publicity campaign and the unauthorized work permits, were never resolved. Judge Werker correctly rejected defendants' second argument when he pointed out that ¶ 41(b) provides that "the parties *may* make a complaint to the administrator", thus showing that while ¶ 41(a) provided one means to resolve disputes, it was not the only means, and its 30 day limitation period could not bar plaintiffs from complaining to the district court about the older workers' provision and recordkeeping violations.

On their alternative laches defense Local 28 and the JAC argue that plaintiffs unreasonably delayed in asserting the contempt claims, that the delay was inexcusable, and that their failure to act quickly prejudiced defendants. *Environmental Defense Fund v. Alexander*, 614 F.2d 474 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980). Initially, although plaintiffs may have been in the best position to bring defendants' violations to the attention of the district court, it was the defendants who were

charged with reasonable diligence and making energetic efforts to comply with the orders of the court. Their attempt to shift the onus of inactivity to plaintiffs is misguided.

Even if we were to entertain the laches defense, however, it would fail, for plaintiffs did not sit quietly by while defendants refused to comply with the district court's orders. Instead, they complained, albeit informally, to defendants and to the administrator on many occasions. Defendants had ample notice that plaintiffs were dissatisfied with their efforts, and they cannot credibly claim they relied on plaintiffs' "inaction". Despite repeated urgings by plaintiffs and the administrator, defendants ignored, or at best made only minimal efforts to comply with, the district court's orders. Moreover, plaintiffs initially pursued measures less drastic than contempt in their attempt to urge defendants toward compliance. See *United States v. United Shoe Corp.*, 391 U.S. 244, 249 (1968). Defendants' laches defense therefore fails, and the district court's findings of contempt with regard to the issuance of unauthorized work permits, failure to propose the general publicity campaign, and record keeping violations are affirmed. For other reasons discussed below, however, we reverse the finding with respect to the older workers' provision.

Local 28 and the JAC raise a more credible challenge to the district court's finding that the apprenticeship program was underutilized. To show that the apprenticeship program was underutilized after the O&J was entered in 1975, Judge Werker sought to compare the number of apprentices indentured between 1971 and 1975 with the number indentured between 1976 and 1981. In so doing, however, he mistakenly compared the total number *en-*

rolled in all four years of the program during the period before the O&J, 1971-75 (2,164) with the number *indentured*, that is the new enrollees, during the period after the O&J, 1976-81 (334). Defendants seize upon this error to argue that the district court's entire finding of underutilization was clearly erroneous, and that the contempt order must therefore be reversed. We disagree with defendants' conclusions.

Contrary to the argument advanced by Local 28 and the JAC, Judge Werker's finding of underutilization does not hinge entirely on his mistaken statistical comparison of the pre- and post-judgment figures. That factor was only a small part of the overall evidence showing underutilization of the apprenticeship program. Other evidence showed that after the O&J was entered:

(1) There was a sharp increase in the ratio of journeymen to apprentices employed by contractors. It rose from 7:1 before the O&J to 18:1 by 1981. The ratio generally recognized by the industry was 4:1, a ratio that Local 28 indicated it would follow when it registered its apprenticeship program with the New York State Department of Labor.

(2) The average number of hours worked annually by Local 28's journeymen increased dramatically from 1,066 in 1975 to 1,666 in 1981.

(3) The percentage of unemployed apprentices decreased from 6.7% in 1977 to 0% by 1981.

(4) Between July 1981 and March 1982 the union issued more than 200 temporary work permits, predominantly to white journeymen.

(5) Defendants refused to conduct the general publicity campaign that was designed to attract nonwhites to the apprenticeship program.

In short, despite a need for more apprentices demonstrated by items (1) through (4) above, defendants refused to advertise the apprenticeship program and thereby help fill the need. This evidence solidly supports Judge Werker's conclusion that defendants underutilized the apprenticeship program. Moreover, any lack of more specific figures with respect to utilization of the apprenticeship program is attributable to defendants' failure to comply with the reporting requirements of the court's order. Defendants may not benefit from this non-compliance.

Defendants' final challenge to the first contempt proceeding focuses on the older workers' provision. They contend that the district court clearly erred in finding that provision violated the paragraphs of the O&J which enjoined defendants from doing any act with the purpose or effect of discriminating against nonwhites. Defendants contend that the older workers' provision was never implemented, and therefore did not have any effect—discriminatory or otherwise—on nonwhites. We agree.

Paragraphs 1, 7, and 21(g) of the O&J enjoin Local 28, the JAC, and the contractors' association from engaging in any act "which has the purpose or effect of discriminating [against nonwhites]". During negotiations on their collective bargaining agreement, Local 28, the contractors' association, and individual employers agreed to amend their labor agreement to provide protection for Local 28 members who were over 52 years of age. They entered into a memorandum of agreement which included the following provision:

During periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field.

The essence of this provision was to ensure that one older worker over 52 would be employed for every four workers employed. There is no claim that its purpose was to discriminate against nonwhites. Instead, plaintiffs claim that this older workers' provision was merely discriminatory in effect, because the percentage of nonwhites in the protected age group was very small as a result of defendants' past discriminatory practices. However, defendants introduced evidence, not contested by plaintiffs, showing that the provision had never been applied in practice. Thus, although plaintiffs proved through the testimony of Dr. Harriet Zollner that, if implemented, the provision would have had a disparate impact, defendants established that no such impact had ever occurred.

Plaintiffs, therefore, failed to prove that the older workers' provision had either a discriminatory purpose or present discriminatory effect, and Judge Werker erred in holding Local 28, the JAC, and the contractors' association in contempt for merely *agreeing* to the older workers' provision. "[A] district court, in exercising the awesome power of contempt, must turn square corners". *United States v. Edgerton*, 734 F.2d 913, 915 (2d Cir. 1984). We therefore reverse the contempt finding against all defendants with regard to the older workers' provision. If the district court concludes that the provision will have a potentially discriminatory effect, it may strike the provision from the collective bargaining agreement and thereby insure that its discriminatory impact will never be felt.

However, on this record even such a mild injunctive remedy may be unnecessary in the absence of more facts with respect to the older workers' provision. On oral argument we were told that the provision had been, or was about to be, removed from the collective bargaining

agreement entirely. Moreover, in a motion made shortly before oral argument, defendants asserted that the version of the older workers' provision that was actually incorporated into the collective bargaining agreement had applied only to journeymen and not to apprentices. If the provision no longer exists, or alternatively, if it applies only to journeymen and if there is no evidence to suggest that the provision will have a discriminatory effect on nonwhites, then there is no reason in this action to grant any relief with respect to the provision. But without more facts in a properly developed record we can reach no final conclusion. We therefore remand this issue to the district court to determine what provision was actually adopted, and whether that provision will operate to discriminate against nonwhites. If the adopted provision will discriminate, the district court should strike it from the collective bargaining agreement unless defendants delete it voluntarily. If defendants do remove the provision, the whole issue, of course, will be moot.

Our reversal of the district court's finding with regard to the older workers' provision also compels us to vacate the relief ordered against the contractors' association in the district court's fund order. Agreement to the older workers' provision was the only alleged contemptuous conduct attributed to the contractors' association. Because of it Judge Werker ordered the contractors' association and the JAC to pay jointly for the administrative costs of the training fund. Since there was no contempt in this regard, however, there is no basis for any relief against the contractors' association. We leave it to the discretion of the district judge to determine how the contractors' association's share of those costs should be reallocated between Local 28 and the JAC.

Similarly, we reverse the court's award of attorneys' fees and costs to plaintiffs as against the contrac-

tors' association. As will be discussed in II.B., *infra*, however, the relief ordered against the JAC and Local 28 is solidly supported by the evidence, and remains unaffected by reversal of the contempt finding based on the older workers' provision.

To sum up on the first contempt proceeding, we affirm the district court's findings with regard to four of the five bases for its decision. We reverse insofar as a contempt finding was based on the older workers' provision, and we remand to the district court to determine the status and effect of that provision. We also reverse all relief granted against the contractors' association. We now turn to the second contempt proceeding.

2. Challenges to the Second Contempt Proceeding.

Local 28 and the JAC raise various challenges to the second contempt proceeding conducted before the administrator whose findings were adopted by the district court. They claim (a) that inadmissible hearsay was relied upon by the administrator to prove a violation of the administrator's order, (b) that their misdesignation of the race of two workers was a *de minimis* violation of RAAPO, (c) that the administrator waived any reporting requirements as to the merged locals, and (d) that the plaintiffs' complaint about inaccurate man-hour reports was barred by laches.

(a) Local 28 was charged with violating an order of the administrator requiring it to serve the O&J and RAAPO on each employer by mail that was "certified, return receipt requested. Copies of the certification cards are to be provided to the parties upon their receipt by Local 28." At the second contempt hearing, plaintiffs

introduced evidence to show that before the proceedings were instituted, the plaintiffs had asked Local 28 for a list of the contractors served and proof of that service. Local 28's counsel responded that he was unable to obtain proof of service. The city then requested an affidavit "from the Local 28 official responsible for service of the O&J and RAAPO", but no affidavit was ever provided.

In addition to the foregoing evidence, plaintiffs also offered, and the administrator erroneously admitted, hearsay testimony of a contractor to prove nonservice of the O&J and RAAPO. In response, Local 28 again did not produce any witness to testify about service of the O&J and RAAPO, but counsel for Local 28 sought to testify about the procedures used. The administrator correctly prevented counsel from testifying on ethical grounds and because he thought the violation was shown as soon as certification was not produced. Defendants offered no evidence to show compliance with the administrator's order. We think it clear that the administrator erroneously admitted the hearsay testimony, but the error was harmless because the improper testimony was superfluous.

(b) Local 28 next contends that the misdesignation of the race of two of its members was a *de minimis* violation of RAAPO. If this finding stood alone, we might agree. However, when examined in light of all the violations alleged in both proceedings, we are convinced that this violation further reflects defendants' unwillingness to comply with RAAPO. Thus, we reject defendants' *de minimis* argument.

(c) Defendants also argue that the administrator waived the reporting requirements as to merged locals. We find no evidence in the record to support a waiver.

On the contrary, the administrator urged Local 28 to have its records include data on the merged locals, but defendants ignored him.

(d) Finally, defendants urge laches as a bar to plaintiffs' complaints about inaccurate man-hour reports because "the city should have been aware that the JAC's apprentice manhour reports were inaccurate". Again defendants misconstrue the obligations of the parties: it is defendants who are charged with the duty to comply with the court's orders, not plaintiffs. Defendants cannot complain simply because plaintiffs did not discover defendants' errors sooner, for they disregarded the court's orders at their own peril. See *McComb v. Jacksonville Paper Co.*, 336 U.S. at 192. Defendants' laches defense also fails because they have pointed to no evidence showing either reliance on plaintiff's inactivity, or prejudice resulting therefrom.

In sum, on the second contempt proceeding, the district court's determination that defendants had violated several provisions of the O&J, RAAPO, and the administrator's orders was supported by clear and convincing evidence which showed that defendants had not been reasonably diligent in attempting to comply with the orders of the court and the administrator.

In his dissenting opinion, our colleague, Judge Winter, expresses the view that Judge Werker's findings of contempt were clearly erroneous because "[t]he union's only pertinent obligation under RAAPO . . . is to report on the number of apprentices indentured and to obey any decision by the Administrator altering that number . . .", and because "there is absolutely no basis for the claim of apprenticeship under-

utilization once the economic circumstances are taken into account". We think such a view treats Judge Werker's approach to the contempt issue too narrowly. For over 15 years both the federal and state courts have sought to require Local 28 to end its unlawful discrimination against minorities. While the factor of underutilizing apprentices may in one sense be viewed, as Judge Winter describes it, as "the centerpiece of the contempt finding", it assumes that position only because it is not only a partial cause of the lack of sufficient progress in integrating the union but also a point at which the success or failure of the program can be readily measured. In other words, failure to have the apprentices employed is both an independent ground for contempt and a symptom of the effects of defendants' other kinds of contemptuous conduct.

Many of the uncertainties about underutilization that are urged by defendants are due in large part to the union's noncompliance with the reporting provisions of RAAPO. Had the union complied promptly and accurately with the recordkeeping and reporting requirements the picture as to underutilization would be clearer.

Nor are the difficult economic circumstances of the sheet metal workers an adequate justification for the union's continued discrimination. Even if it were true, as Judge Winter states, that the union "faced an excruciating reduction in demand for its services in the years in question", that circumstance would not justify the union's discriminatory favoring of journeymen over apprentices, a fact that is crystal clear from (1) the tremendous increase during the relevant period in the apprentice:journeymen ratio from 1:7 to 1:18 and (2) from

the decline in percentage of unemployed apprentices during the period 1977-1981 from 6.7% to 0%. One of the principal reasons for revising the original AAPO into RAAPO was to adjust for the "changed working and employment conditions in the sheetmetal industry in New York City, including the present severe and widespread unemployment in the industry". RAAPO § 1.

Indeed, RAAPO was designed both "to assure that in light of these changed circumstances and conditions" the 29% goal would be reached by July 1, 1982, and "to assure that substantial and regular progress is made toward this goal in each year prior to 1982." *Id.* Most significantly, RAAPO provided that the goal of the revised program was "to assure that all members and apprentices of Local 28 share equitably in all available employment opportunities in the industry." RAAPO § 1 (emphasis added). It was not RAAPO's intent, therefore, that difficult economic circumstances would permit the largely white group of journeymen to be preferred in work allocations over the racially integrated group of apprentices; yet that is precisely the effect of the combined violations of the O&J and RAAPO found by Judge Werker below. We reject the tacit premise behind Judge Winter's opinion that the burden of more difficult economic circumstances may, through changed employment patterns, be shifted to the minorities. Particularly in light of the determined resistance by Local 28 to all efforts to integrate its membership, we think the combination of violations found by Judge Werker below amply demonstrates the union's foot-dragging egregious noncompliance with the O&J and RAAPO and adequately supports his finding of civil contempt against both Local 28 and the JAC.

B. Contempt Remedies: The Fund and the Order to Computerize Records.

"Generally, the sanctions imposed after a finding of civil contempt serve two functions: to coerce future compliance and to remedy past noncompliance." *Vuitton et Fils v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979); see *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947). "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb v. Jacksonville Paper Co.*, 336 U.S. at 193-94. With these principles in mind, consider Local 28's and the JAC's challenges to the relief imposed by the district court to remedy defendants' contemptuous conduct. This discussion is limited to Local 28 and the JAC because we are reversing all contempt relief ordered against the contractors' association. See II.A., *supra*.

At the outset, Local 28 and the JAC claim that the remedies imposed in the first contempt order are neither compensatory nor coercive, and thus must be deemed punitive. *Soobzokov v. CBS, Inc.*, 642 F.2d 28, 31 (2d Cir. 1981). Since punitive remedies may be imposed for only criminal contempt, whose due process requirements were not followed here, see *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966), they conclude that the first contempt proceeding must be reversed. We think defendants read the first contempt decision much too narrowly, because its remedies, including the training fund, have both compensatory and coercive functions.

After finding that the evidence proved clearly and convincingly numerous violations of the O&J, RAAPO, and orders of the administrator, Judge Werker was faced

with the task of crafting appropriate relief "to remedy the past noncompliance of the defendants." He chose to aim the relief where it would be most effective—the apprenticeship program—and he embraced the idea of a fund "for the purpose of developing the apprenticeship program of Local 28, with an eye toward increasing the non-white membership of the program and the union." The fund's purpose was to compensate nonwhites, not with a money award, but by improving the route they most frequently travel in seeking union membership. Thus it was specifically intended to compensate those who had suffered most from defendants' contemptuous underutilization of the apprenticeship program, which had "impeded the entry of non-whites into Local 28 in contravention of the prior orders of [the district] court."

The fund also has coercive components. For example, paragraph 3 of the order establishing the fund provides that it will remain in existence "until the [29% membership goal] * * * is achieved". Paragraph 5 further provides that, upon termination, the remaining monies will be returned to defendants after plaintiffs are reimbursed for any contributions they might make to the fund. In addition, Local 28's contributions to the fund based on hours worked by its members will cease when the membership goal is achieved.

The JAC and Local 28 next contend that if any finding underlying the two contempt proceedings is reversed, the entire remedy must be vacated. While this might be a tenable argument if the fines had been imposed for multiple findings of criminal contempt, *see Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 440 (1911), we do not think it governs our decision in these civil contempt proceedings.

In the first contempt decision the district court found that the defendants had committed five violations of prior court orders: underutilization of the apprenticeship program, reporting violations, failure to conduct the general publicity campaign, unauthorized issuance of work permits, and adoption of the discriminatory older workers' provision. We have reversed the last finding because the conduct proved does not violate a clear order of the court. However, the older workers' provision presents a problem separate from the other violations. Since that provision was not implemented, it had no past impact on the apprenticeship program, and since it will not be applied in the future no purpose would be served by permitting its reversal to undermine the fund order. Indeed, defendants virtually concede in their brief that the fund order was aimed primarily at the finding that the apprenticeship program was underutilized. Thus, we conclude that reversal on the older workers' provision is not fatal to the fund order because the remedies ordered are amply warranted by the other findings of contempt, and we affirm them on the basis of those findings.

Finally, the JAC and Local 28 have not challenged the order which requires them to pay the cost of monitoring the computerized recordkeeping system. We therefore affirm that order. We turn now to the parties' various challenges to certain provisions of AAAPPO.

C. Challenges to AAAPPO.

In November 1983 Judge Werker approved the third version of the affirmative action plan (AAAPPO), which affects Local 28, its JAC, the locals that had been merged into Local 28, their JACs, and all contractors who use the union's sheet metal workers. AAAPPO modified RAAPPO

in six significant ways. It (1) increased the nonwhite membership goal from 29% to 29.23% to reflect the addition of the merged locals; (2) established an apprentice to journeymen ratio of 1:4; (3) created a three-member apprentice selection board; (4) imposed an indenture ratio of one nonwhite for every white admitted to the apprenticeship program; (5) permitted work to continue on developing new selection procedures, but barred their use until the membership goal could be accomplished; and (6) incorporated the order requiring defendants to bear the cost of an advisor to monitor the computerization of Local 28's records.

AAAPO was a response by the district court to three developments in this case: first, Local 28's failure to meet the 29% nonwhite membership goal by July 1, 1982; second, Local 28's contemptuous refusal to comply with many provisions of RAAPO; and third, the merger of several largely white locals outside New York City into Local 28.

Local 28 and the JAC challenge the district court's adoption of AAAPPO, however, contending that: (1) AAAPPO contravenes Title VII and the equal protection component of the fifth amendment; (2) AAAPPO unduly interferes with union government; and (3) the district court abused its discretion by adopting five of the six provisions of AAAPPO described above. On its cross-appeal the city contends that the findings underlying the district court's adoption of the 29.23% interim nonwhite membership goal were clearly erroneous, and that the figures should have been higher.

Since entry of the O&J in 1975, the district court has retained jurisdiction "to enter such orders as may be

necessary to effectuate the equal employment opportunities for non-whites and other appropriate relief"; consequently, additional violations of Title VII were not needed to trigger modifications of the remedies that were originally ordered. *See United States v. Local Union No. 212*, 472 F.2d 634, 635-36 (6th Cir. 1973). Any changes made by the district judge were to be guided by the sound exercise of his equitable discretion, *see Rios v. Enterprise Association of Steamfitters Local 638*, 501 F.2d 622, 631 (2d Cir. 1974), and our task is not to exercise our own discretion, but to determine whether the district judge has abused his. *Association Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 279 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

Defendants' first challenge to AAAPPO need not detain us long. Defendants contend that the core provisions, which constitute the affirmative action program, violate Title VII and equal protection. We disagree. This court has consistently held that appropriate affirmative action measures are not proscribed by Title VII, *see Association Against Discrimination v. City of Bridgeport*, 647 F.2d at 280; *EEOC v. Local 638*, 532 F.2d at 827; *Rios v. Enterprise Association of Steamfitters Local 638*, 501 F.2d at 629-31, or by the constitution. *Id.* at 628 (citations omitted). Moreover, this court has twice upheld the affirmative action provisions of RAAPO, *EEOC v. Local 638*, 532 F.2d at 829-33; *EEOC v. Local 638*, 565 F.2d at 33-36, and we therefore reject any challenge to the parallel provisions contained in AAAPPO.

Finally, we believe that defendants' attempt to rely on *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984), is misplaced. Defendants argue that *Stotts* eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination. We

do not accept defendants' expansive interpretation of that opinion.

In *Stotts*, a federal district court enjoined the city of Memphis from laying off black fire department employees in accordance with the seniority system contained in the collective bargaining agreement governing relations between the city and its employees. The black workers had been hired pursuant to a year-old consent decree settling prior charges of employer discrimination. The consent decree did not find that Memphis had violated Title VII, and did not identify any particular employee who had suffered from the alleged discrimination. In granting the injunction, the district judge found that although the seniority provision was not adopted with discriminatory intent, it nevertheless had to give way to the consent decree because of the discriminatory effect that would result from the city's use of the seniority system. *Id.* at 2581-82. The district court's injunction was affirmed on appeal to the sixth circuit, 679 F.2d 541 (6th Cir. 1982), and the Supreme Court reversed. 104 S.Ct. at 2590.

Stotts can be distinguished from the present case in at least three ways. First, the affirmative action ordered by the district court in that case was in direct conflict with a bona fide seniority plan that was protected by § 703(h) of Title VII. *Id.* at 2587. In our case § 703(h) is not involved because there is no seniority plan in conflict with the remedies imposed by AAAPPO or the fund order. Second, the court's discussion of § 706(g), particularly relied on by the defendants here, related only to the "make whole" relief ordered in the district court, *id.* at 2589, and did not address prospective relief like that ordered in AAAPPO and the fund order. Third, in

Stotts there was no finding of any intent to discriminate, *id.* at 2581, whereas in this case we have affirmed the district court's finding that defendants have intentionally discriminated against nonwhites. These three factors significantly distinguish *Stotts* from the case at bar and undercut defendants' reliance on that case. Thus, defendants first challenge to AAAPPO fails.

Local 28's complaint that the obligations imposed by AAAPPO will interfere with its right to self-government need not detain us either. We have rejected this contention on previous appeals, *e.g.*, *EEOC v. Local 638*, 532 F.2d at 829, and we reiterate that the government of Local 28 will be returned to its members as soon as it ends its unlawful discrimination against nonwhites. Until that time the government of Local 28 must remain subject to the supervision of the district court and the administrator.

There being no merit to defendants' first two contentions, we turn to defendants' challenges to the specific remedial provisions added by AAAPPO.

1. *The 29.23% Nonwhite Membership Goal.*

We reject defendants' attempt to characterize the membership goal as a permanent quota, because the provision at issue is clearly not a quota, but a permissible goal. See *Rios v. Enterprise Association Steamfitters Local 638*, 501 F.2d at 628 n.3.

This circuit has a well-established two-pronged test for the validity of a temporary, race-conscious affirmative action remedy such as a membership goal:

There must first be a "clear cut pattern of long-continued and egregious racial discrimination". Second, the effect of reverse discrimination must not be

"identifiable", that is to say, concentrated upon a relatively small, ascertainable group of non-minority persons.

EEOC v. Local 638, 532 F.2d at 828 (quoting *Kirkland v. New York State Dep't of Correctional Services*, 520 F.2d 420, 427 (2d Cir.), rehearing en banc denied, 531 F.2d 5 (1975), cert. denied, 429 U.S. 823 (1976)).

A race-conscious goal in AAAPo passes this test as it did in RAAPO in 1976. This court has twice recognized Local 28's long continued and egregious racial discrimination, *EEOC v. Local 638*, 532 F.2d at 825; *EEOC v. Local 638*, 565 F.2d at 36 n.8, and Local 28 has presented no facts to indicate that our earlier observations are no longer apposite. Certainly, the effects of the union's discriminatory conduct have not been eliminated, for its nonwhite membership is still only 10.8%. Therefore, *Kirkland's* first prong has been satisfied.

We think the second prong has been satisfied as well, because the effects of the affirmative action remedies incorporated in AAAPo will not unnecessarily trammel the rights of any readily ascertainable group of nonminority individuals. Indeed, Local 28 does not attempt to show that the whites who might be affected by the established goals are any more identifiable now than they were in 1976 and 1977 when we approved the same type of provision in RAAPO.

Local 28 does argue, however, that the membership goal set forth in AAAPo has become "permanent", because at its target date it will have been in effect for eleven years. Defendants' argument is faulty in two respects. First, "temporary" in the context of the imposition of affirmative action remedies means that the reme-

dies will be in place only until the effects of the past discrimination have been eliminated, see *United Steel Workers of America v. Weber*, 443 U.S. 193, 208-09 (1979), and because AAAPo will cease when those effects are eliminated from Local 28, the goal is, by definition, temporary, not permanent. Second, even if permanency were merely a function of time, the responsibility for this membership goal's being "permanent" would have to be laid solely at the feet of the defendants, because it has been their foot-dragging resistance to compliance with the prior orders that has caused the district court to extend the nonwhite membership goal until 1987.

On cross-appeal, the City of New York has also challenged AAAPo's goal, but for a different reason. It contends that the district court's adoption of the 29.23% figure was too low and clearly erroneous. After reviewing the record of the hearing held on this issue, we conclude that the district court's findings were not clearly erroneous, and, indeed, are amply supported by the evidence. Thus, we affirm the 29.23% figure adopted by the district court.

2. *The 1:4 Apprentice:Journeyman Ratio.*

AAAPo requires the union to refer for work, and the sheet metal employers to hire, one apprentice for every four journeymen. Defendants attack this provision hypothetically, contending that if we reverse the district court's contempt finding with regard to underutilization of the apprenticeship program, then we must also reverse this provision. Taking defendants' argument simply as posed, we would have to affirm the 1:4 apprentice:journeyman ratio because we are not reversing, but affirming, the underutilization findings by the district court.

Going further, however, the 1:4 ratio is a critical element in AAAPPO because it helps insure that defendants will not underutilize the apprenticeship program in the future. Because of the ratio employers will be motivated to hire more apprentices and they will have the court's assistance in overcoming union opposition; the union faces further contempt penalties if it does not cooperate in meeting the ratio; and the JAC will have to admit more apprentices to its program in order to meet the increased demand for apprentice labor. Moreover, additional jobs available to apprentices will, in time, help to attract larger apprentice classes.

Finally, we think the 1:4 ratio requirement is reasonable and flexible—reasonable, because it reflects a ratio that the industry has historically followed; flexible, because exemption from the ratio in particular cases may be obtained upon a proper showing. Thus, we affirm the 1:4 ratio provision of AAAPPO.

3. *Apprentice Selection Board.*

AAAPPO, §§ 13 & 14, provides for an apprentice selection board to “establish standards and procedures for the selection of apprentices.” The board is composed of one designee each from the plaintiffs, the JAC, and the court. It is charged with selecting both nonwhite and white apprentices to enter the apprenticeship program.

Defendants claim that the selection board provision will have an adverse impact on the union's freedom to govern its own affairs. We have rejected this argument when raised in prior challenges to similar provisions, *EEOC v. Local 638*, 565 F.2d at 33-34, and we find it no more persuasive here. Since it is an interim measure,

the board can be disbanded as soon as the nonwhite membership goal is reached. Unlike a provision rejected by us in the 1976 appeal to this court, *EEOC v. Local 638*, 532 F.2d at 830, the racial makeup of the board under AAAPPO is not prescribed. This selection board is more analogous to the board of examiners approved in RAAPPO.

4. *Elimination of the Apprentice Examination.*

Paragraphs 25-28 of RAAPPO ordered defendants to develop and administer apprentice entrance examinations validated by the EEOC, and in the amended affirmative action plan proposed by plaintiffs these requirements were carried forward. However, in his order adopting AAAPPO, entered on September 1, 1983, Judge Werker eliminated the provisions in plaintiffs' proposal that called for administration of apprenticeship examinations. He found that many had complained of the tests' adverse impact on nonwhites, that agreement on the tests' validity was virtually impossible, and that the tests were costly to administer. AAAPPO takes a new approach to the apprentice selection procedure. It substitutes the selection board discussed above, and also orders defendants to work with industrial psychologists to develop objective, nondiscriminatory selection procedures.

On appeal, the EEOC contends that paragraph 15 of AAAPPO prohibits the use of the new selection procedures to be developed, even if proven nondiscriminatory, until the 29.23% membership goal is reached. Although we do not necessarily agree with the EEOC's narrow reading of AAAPPO, in order to eliminate any possible confusion, we direct that paragraph 15 of AAAPPO be amended to state:

15. Upon termination by court order of this AAPO, or at such earlier time as the court may order, the defendant's and the JAC's shall use selection procedures for admission to the apprentice program as developed pursuant to Paragraphs 16 through 20. Such selection procedures shall be designed to have the least adverse impact on non-whites. [New matter in italics].

With this provision the defendants may use new selection procedures at any time after they prove to the district court that they are nondiscriminatory.

5. *The Nonwhite to White Indenture Ratio.*

In order to insure that adequate numbers of non-whites are taken into the apprenticeship program, the district court provided in AAPO that the JAC must indenture one nonwhite apprentice for every white apprentice. Local 28 and the JAC, joined by the EEOC, challenge this 1:1 indenture ratio as an abuse of the district court's discretion. We agree.

We have recognized that temporary hiring ratios may be necessary in order to achieve integration of a work force from which minorities have been unlawfully barred. *Association Against Discrimination v. City of Bridgeport*, 647 F.2d at 283; *United States v. City of Buffalo*, 633 F.2d 643, 646-47 (2d Cir. 1980). However, such race-conscious ratios are extreme remedies that must be used sparingly and "carefully tailored to fit the violations found", *Association Against Discrimination v. City of Bridgeport*, 647 F.2d at 281, and we will approve such ratios only where "no other method was available for affording appropriate relief". *Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Com-*

mission, 490 F.2d 387, 398 (2d Cir. 1973); *Bridgeport Guardians, Inc. v. City of Bridgeport*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

Here, other methods do seem to be available. To begin with, defendants have voluntarily indentured 45% nonwhites in the apprenticeship classes since January 1981, and there is no indication that defendants will in the future deviate from this established, voluntary practice. Moreover, should defendants abandon the practice, the district court could modify its order at that time. Finally, the district court's selection board will be fully able to watch over the process and insure that a sufficient number of nonwhite apprentices is selected. Since these alternative methods seem well-calculated to assure an appropriate nonwhite ratio in the apprenticeship program, it was an abuse of discretion for the district court to impose the 1:1 indenture ratio at this time, and we strike that provision from AAPO.

III. CONCLUSION

We affirm all but one of Judge Werker's findings of contempt against the defendants. We reverse and remand for further proceedings Judge Werker's finding that agreement to the older workers' provision violated the O&J and RAPO. Because that is the sole finding of contempt against the contractors' association, we reverse the contempt relief and the awards of administrative expenses, attorneys' fees and costs ordered against it. We affirm, however, all of the contempt relief ordered against Local 28 and the JAC. We also affirm, with two modifications, the AAPO adopted by Judge Werker. Finally, we affirm the order, incorporated in AAPO, establishing a temporary, nonwhite membership goal of 29.23%.

WINTER, *Circuit Judge*, dissenting:

This case, which raises sensitive constitutional issues regarding the judicial imposition of racial quotas, controversial questions of statutory interpretation concerning so-called reverse discrimination as a remedy under Title VII, and more mundane yet important legal issues as to use of the contempt power, divides this court for a third time. *EEOC v. Local 638*, 565 F.2d 31, 37 (2d Cir. 1977) (Meskill, J., dissenting); *EEOC v. Local 638*, 532 F.2d 821, 833 (2d Cir. 1976) (Feinberg, C. J., concurring). On previous occasions, we approved entry of an Order and Judgment ("O & J") and "Revised Affirmative Action Program and Order" ("RAAPO"). These constitute a complex code of conduct encompassing forty-five pages of substantive and procedural detail with regard to admission to the apprenticeship program, membership in Local 28 and job referral in the sheet metal industry. The O & J and RAAPO vest direct control over these matters in the administrator, who is in effect a receiver with power, *inter alia*, to govern Local 28 so far as the recruitment and admission of minorities to the union and the referral of apprentices to jobs are concerned. We also established, over Judge Meskill's dissent, a 29% goal for minority membership in Local 28 to be achieved through the O & J and RAAPO.

My disagreement with the majority stems largely from its failure to address the fact that Local 28 had the approval of the administrator for every act it took that affected the number of minority workers entering the sheet metal industry. The majority's tacit premise thus is that full compliance with the specific terms of the O & J and RAAPO is legally insufficient to avoid sanctions for contempt if the 29% goal is not met. This

holding transforms the 29% figure from a goal guiding the administrator's decisions into an inflexible racial quota.

Consider, for example, the alleged underutilization of the apprenticeship program by Local 28. This charge is by far the most important since that program provides 90% of the union's new members and underutilization is the only allegedly contumacious conduct of Local 28 which could have seriously diminished the number of minority workers entering the sheet metal industry. It is thus the only allegation even remotely justifying the extraordinary sanctions imposed.

In my view, Local 28's actions cannot constitute contempt under the O & J and RAAPO because the final authority with regard to the utilization of the apprenticeship program lay with the administrator, and he approved the number of apprentices indentured throughout the period in question. Paragraph 14 of the O & J, set out in the margin,¹ gives the administrator full power over

¹ That paragraph reads:

14. In addition to the powers and duties specified in this Order and the Program, the Administrator shall be empowered to take all actions, including but not limited to the following, as he deems necessary and proper to implement and insure the performance of the provisions of this Order and the Program:

- (a) establish additional record-keeping requirements;
- (b) increase the frequency with which the apprentice entrance test and/or the hands-on journeyman's test described more fully *in/va* are administered;
- (c) devise and implement additional methods and procedures for entry by non-whites into Local 28 or the Apprentice Program;
- (d) establish ratios of non-whites to whites by which individuals will be admitted to Local 28 or the Apprentice Program;
- (e) establish through the Program or otherwise such interim percentage goals of non-white membership in Local 28 and/or the Apprentice Program in order to insure that the 29% goal set forth in paragraph 11 *supra* is achieved by July 1, 1981;

[Footnote continued on following page]

the apprenticeship program, including the number of persons to be admitted. The RAAPO, promulgated pursuant to the O & J, specified that no less than 36 apprentices be indentured by February, 1977, and provided that the size of future classes be determined by the following procedure:

Upon consideration of the goals of this Revised Program, and the availability of employment opportunities in the industry, the JAC shall forward its recommendation of the number of apprentices to be indentured in each class . . . to counsel for the parties and the Administrator The Administrator shall review the recommendations Upon a finding that the JAC's recommendation does not meet the goals and objectives of the Revised Program the Administrator shall render his determination as to the appropriate number of apprentices to be indentured.

The history of the RAAPO indicates that the administrator was to determine the number of apprentices to be indentured periodically after taking prevailing

[Footnote continued from previous page]

(f) establish procedures and practices for work referral and employment, including but not limited to work referral and employment procedures and practices based on ratios of non-whites to whites, furloughs and/or rotation;

(g) conduct an investigation into, and/or require Local 28, and/or JAC to submit reports, concerning any aspect of the operation of Local 28 and the Apprentice Program;

(h) review and approve or object to the disposition of all applications for entry into Local 28 or the Apprentice Program. At such time, if ever, that the Administrator shall adopt and implement any of the procedures and requirements authorized in this paragraph, he shall do so in writing and such procedures and requirements shall thereafter be deemed included in and part of the Program described *in/ra* and subject to review by the Court.

economic conditions into account. The RAAPO replaced the first affirmative action plan and order ("AAPO"), which dictated fixed numbers of apprentices to be indentured periodically, but which the administrator found to be unrealistic in view of the sheet metal industry's depressed economic conditions.² After the district court approved the O & J and RAAPO, Local 28 appealed and challenged the provisions relating to the apprenticeship program as unduly intrusive on the union's self-government. This court rejected that argument and Judge Smith's opinion expressly stated that the "[i]ndenture of apprentices . . . is appropriately subject to administrator oversight. *The balancing of the need for training workers against existing economic conditions is appropriately left*

² The AAPO, which was superseded by the RAAPO, called for: (1) the indenture of 100 apprentices in February, 1976, 200 in July, 1976, and 200 each year thereafter; (2) the rotation of apprentices through jobsites in order to equalize employment among apprentices; and (3) a ratio of one apprentice for every four journeymen.

None of these requirements were met because of an egregiously unfavorable economic climate described *in/ra* in the text. The JAC indentured only 53 apprentices in February, 1976, none in July, 1976, and 36 in all of 1977. In addition, the JAC stopped the rotation system on the grounds that too many apprentices were quitting the program. Nor was the ratio of one apprentice for every four journeymen observed. The Administrator was informed of these developments by the JAC in a series of letters during the summer of 1976 and held a hearing on December 21, 1976. The EEOC later filed a motion to revise the AAPO. The result of the hearing and the motion papers was a report by the Administrator on the AAPO and promulgation of the RAAPO.

In view of the unfavorable economic circumstances, no sanctions were imposed for a failure to comply with the AAPO. To the contrary, the February, 1977 apprentice class size was reduced from 100 to 36 and the size of future classes was to be determined in accord with the discretion of administrator pursuant to the procedure quoted in the text, *supra*. The verb preceding the rotation plan was changed from "shall" to "may" and the 4:1 ratio was dropped altogether as not workable.

to his informed discretion." 565 F.2d at 35 (emphasis added).

The union's obligation under RAAPO, therefore, is to report on the number of apprentices indentured and to obey any decision by the administrator altering that number on his own initiative or upon objection by the plaintiffs. After final entry of the O & J and RAAPO, the union informed the administrator and the plaintiffs virtually every month of the number of apprentices in the program.³ Those reports are in the record. On no occasion did the administrator order the union to increase the number of apprentices indentured. Nor did the plaintiffs object to the numbers submitted, as the provision for notice to them contemplated and as they had the clear power to do under Paragraph 15 of the O & J.⁴

For all that appears in the record, the level of utilization of the apprenticeship program, the centerpiece of Judge Werker's contempt finding, was never a serious issue between the parties before the district judge's

³ Apprentice class sizes were reported by the JAC to the Administrator and the plaintiffs on April 6, June 2, June 18, 1976; March 4, April 4, May 9, June 8, July 13, August 3, September 7, November 7, December 7, 1977; January 6, February 27, April 11, May 15, June 6, July 6, August 4, September 12, October 6, November 3, December 4, 1978; January 10, February 13, March 14, April 4, May 9, June 14, August 16, September 18, October 19, November 21, December 14, 1979; January 21, February 22, March 17, April 23, May 23, June 17, July 23, August 7, September 10, October 9, November 12, December 16, 1980; January 21, February 18, March 10, May 5, June 9, August 3, August 6, September 17, October 13, November 13, December 9, 1981; January 11, February 8, March 22, April 7, May 10, 1982.

⁴ That paragraph provides that the administrator shall hear and determine all complaints concerning the operation of this Order and the Program and shall decide any questions of interpretation and claims of violations of this Order and the Program, acting either on his own initiative or at the request of any party herein or any interested person.

decision. The claim of underutilization was not even raised by the plaintiffs in their motion for contempt. The issue literally crept into the case only when Local 28 attempted to show its good faith by relying in its brief in response to the contempt motion on its efforts to recruit minorities into the apprenticeship program and on the fact that every apprenticeship class after entry of the O & J began with 45% minority members. The plaintiffs addressed the apprenticeship issue for the first time in their reply brief and only then asserted underutilization as a ground for contempt. In the hearing before the district judge, the size of the apprenticeship program was mentioned only by the union, again to demonstrate its good faith efforts.

With the issue thus in the posture of an afterthought, the district judge seized upon certain statistics relating to total apprenticeship enrollment and found as a fact that the union deliberately reduced enrollment in the program after final entry of the O & J following our decision in October, 1977. Everyone, including the plaintiffs and the majority, concedes that these statistics were misunderstood by the district court and do not support the conclusion reached. Moreover, in drawing that conclusion, the district judge made no reference whatsoever to the elaborate procedures established in the O & J and RAAPO to determine the size of the apprenticeship program, to the administrator's plenary authority in that regard, to the fact that Local 28 was never ordered by the administrator to increase the number indentured, or to the plaintiffs' opportunity to object as contemplated by the RAAPO.

The majority now affirms the district court on the grounds that its finding is not clearly erroneous. How-

ever, it treats the finding not as one of a deliberate evasion of the O & J and RAAPO by reducing the number of apprentices enrolled after their entry but rather as a more general finding of underutilization not involving an actual reduction of apprentice enrollment. This alteration of the district court's finding is necessary because the number of apprentices enrolled after final entry of the O & J did not generally decline.⁵ The majority also does not discuss the relationship of the O & J and RAAPO to the union's obligations with regard to the apprenticeship program. Since it also does not state what provision of the district court's order has been violated by the operation of the apprenticeship program, one can infer only that the contempt in its view lies not in any failure to comply with the elaborate provisions of the O & J and RAAPO but solely in the failure to reach the 29% racial goal.

Respectfully, I believe the majority is in error in so concluding because the union's obligation with regard to the apprenticeship program is clearly limited to compliance with the specific provisions of the O & J and RAAPO. Indeed, rigid enforcement of the 29% goal without regard to economic or other circumstances is not consistent with the O & J and RAAPO, with our prior decisions in this very case, with Title VII, or probably with the Constitution.

⁵ Enrollment after entry of the orders was as follows:

1977	36
1978	49
1979	30
1980	77
1981	143

Our decision affirming the RAAPO was rendered on October 18, 1977. The enrollment of 36 apprentices in 1977 was specified in the RAAPO itself.

Since the O & J and RAAPO became effective, Local 28 has essentially been in a receivership so far as admissions to membership or job referral are concerned. In the words of Judge Smith, the administrator has the power "to exercise day-to-day oversight of the union's affairs." 532 F.2d at 829. The practical function of the 29% goal is not to impose some overweening obligation on the union but to guide the administrator in determining what Local 28 is to do under the O & J and RAAPO. There is simply no reason whatsoever for a court to deprive a union of its self-governance and impose on it the costs of judicial administration of its affairs only to deny that compliance with the decisions of the court-appointed administrator fulfills the union's obligations. The majority's use of rhetorical assaults and punitive sanctions against Local 28 simply cannot be reconciled with its failure to utter even muted criticism of the administrator who repeatedly authorized the supposedly contumacious acts and continues in office to this day.

Judge Smith's second opinion also explicitly recognized that the number of apprentices indentured must be determined by the administrator in light of "existing economic conditions," 565 F.2d at 35. The majority "rejects" the so-called "tacit premise" of this dissent that difficult economic circumstances may justify reducing the number of new apprentices and thus the number of new minority members. In doing so, of course, it is rejecting Judge Smith's prior ruling in this very case.

As the record amply demonstrates, Local 28 faced an excruciating reduction in demand for its services in the years in question. In fact, the reason for the administrator's revision of the fixed enrollment requirements of the AAPO, see note 2, *supra*, was "the present changed

working and employment conditions in the sheetmetal industry in New York City, including the present severe and widespread unemployment in the industry." Because of shifting economic circumstances, the RAAPO, as proposed by the administrator and approved by us, therefore left the number of the apprentices to be determined in the administrator's discretion exercised in light of prevailing economic conditions. The contempt finding simply disregards this most pertinent history.

The record also demonstrates that the level of utilization of the apprenticeship program was consistent with existing economic circumstances. Although the majority notes a "dramatic" increase in average hours worked annually by a journeyman from 1975 to 1981, the number of journeymen in fact fell from 3,670 to 2,163 in roughly the same period. Even with this enormous decline in journeymen, the average number of forty-hour weeks worked by a journeyman in a calendar year was as follows:

1970 — 52
 1971 — 51
 1972 — 35
 1973 — 31
 1974 — 28
 1975 — 26
 1976 — 25
 1977 — 26
 1978 — 31
 1979 — 37
 1980 — 42

Emphasis has also been placed upon the fact that the unemployment rate among apprentices has declined. However, during 1974 and 1975, when that unemployment

rate was 20% and 40% respectively, large numbers of apprentices left the program when relatively full employment was not offered. As a consequence of that experience the administrator reduced the size of the 1977 apprenticeship class.^{*} Had he not reduced the number of apprentices and thereby reduced apprentice unemployment, the high dropout rate would have made it impossible to increase significantly the percentage of minority journeymen.

Moreover, calculating the hours worked by apprentices as a percentage of total hours worked by both journeymen and apprentices indicates that the apprentices' share of total hours worked actually doubled from 1977 to 1981. Since every apprenticeship class after entry of of the O&J and RAAPO began with at least 45% minority workers and since the share of work allocated to apprentices has dramatically increased, there is absolutely no basis for the claim of apprenticeship underutilization once prevailing economic circumstances are taken into account.

The majority opinion at two points implies that the differences between us stem from "uncertainties" regarding the utilization of the apprenticeship program resulting from the union's failure to file required reports. I do not share any such uncertainties. In fact, the record contains voluminous data with regard to the admission of apprentices. See notes 3 and 5, *supra*, and accompanying text.

Finally, the so-called standard 4:1 ratio of journeymen to apprentices is little more than a nationwide desideratum repeated every fifteen years or so by Department of Labor periodicals. Even simple mathematics, however, reveals that such a ratio can be maintained only

^{*} See note 2 *supra*.

in a growing industry. Its use is thus also subject to prevailing economic conditions.

For these reasons, there has not been a "clear and unambiguous" order of which there is "clear and convincing" evidence of non-compliance, prerequisites to a contempt judgment. *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir.) (per curiam), cert. denied, 454 U.S. 832 (1981). The frustration of the plaintiffs, the district court, and the majority at the union's failure to reach the judicially mandated racial balance even while complying with the O&J and RAAPO is perhaps understandable. However, in light of the facts that large numbers of journeymen did not work during the period in question or worked only meager hours, reactive finger pointing at Local 28 is a faintly camouflaged holding that journeymen should have been replaced by minority apprentices on a strictly racial basis. This is at odds with *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), which rejected such a use of racial preference as a remedy under Title VII. Resort by a federal court to such a strict racial quota in circumstances such as this seems to me also to be of questionable constitutional validity. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 287-320 (1978) (opinion of Powell, J.).

I also disagree with the majority's affirmance of the establishment of the "education fund." The district court ordered the union to finance the fund as part of the contempt sanction without making factual findings as to the need for the fund. As stated by the court, the fund will be used to provide tutorials and counseling for first year minority apprentices, to finance various methods of reducing dropouts among minority apprentices, and to im-

prove the curriculum at vocational and technical schools.

The district judge's order reads in part:

6. The Fund shall be used for the following purposes:

a. Establishing a tutorial program of up to 20 weeks duration for nonwhite first-year apprentices.

b. Creating part-time and summer sheet metal jobs for nonwhite youths between the ages of 16 through 19 who are currently enrolled in or have successfully completed, within the past year, a sheet metal vocational or technical education program or a program in an allied trade requiring the use of tools, math or drafting, such as carpentry.

c. Paying the expenses, including any lost wages, of nonwhite members and apprentices of Local 28 for their services as liaisons to vocational and technical schools having sheet metal programs. The duties of the liaisons shall include, but not be limited to, the following: working with the schools to upgrade the sheet metal program, arranging trips to sheet metal shops and field sites, counseling the students on methods of entry into Local 28 and working with participants in the program set forth in paragraph 6(b) above. The JAC training coordinators and union officials shall cooperate fully with the liaisons in the effort to carry out this program.

d. Appointing a counselor or counselors, whose duties shall include, but not be limited to, the following: monitoring the progress of nonwhite apprentices at each JAC school and on the job, providing nonwhite apprentices with personal and job-related counseling and assisting nonwhite apprentices in adjusting to their school and work environments to help ensure their successful completion of the Apprenticeship Program. The counselor(s) shall be selected and supervised by the Administrator subject to approval by plaintiffs and the Court. Defendants and all Local 28 contractors shall cooperate fully with the counselor(s). Every two months, and at the end of each apprenticeship term, the counselor(s) shall submit to the parties, the Administrator and the Court a report detailing the progress of nonwhite apprentices and setting forth recommendations to resolve any problems nonwhite apprentices may be encountering.

e. Providing stipends to unemployed nonwhite apprentices while they attend their regular apprentice class and any additional classes that will be offered to such apprentices pursuant to the AAPO.

f. Establishing a low-interest loan fund for nonwhite first-term apprentices who demonstrate financial need.

g. Providing stipends to unemployed nonwhite journeymen while they take advanced courses to upgrade their skills.

[Footnote continued on following page]

I do not quarrel with the potential usefulness of such a fund as social policy. However, its central factual premise seems to be the lack of qualified minority applicants able to enroll in and complete the apprenticeship program, an implicit finding by the district court that Local 28 has done all it reasonably could with regard to the training of minority apprentices. If a lack of qualified applicants exists—and if it does not, it is difficult to understand the purpose of the fund—the remedy is not to hold a private organization such as Local 28 responsible for improving the quality of public education in New York.

Many of the other claims of contempt also rest on a shaky foundation. For example, with regard to many of the alleged failures to comply with reporting requirements, Local 28 argued that the administrator had determined that it was not required or able to make such reports. The district judge rejected this argument on the grounds that the administrator had no power to grant such relief, a

[Footnote continued from previous page]

h. Providing financial reimbursement to any employer who has demonstrated to plaintiffs' satisfaction that it cannot afford to hire an additional apprentice to meet the one-apprentice-to-every-four journeymen requirement of the AAPO.

i. Providing incentive or matching funds to attract additional funding from governmental or private job training programs, such as the Dislocated Worker Program established pursuant to Title III of the Job Training Partnership Act. 29 U.S.C. §§ 1651-1658.

j. Additional expenditures may be made from the Fund upon a showing by any party that such an expenditure would serve to increase the nonwhite membership of the union and the Apprentice Program, or to provide support services to non-whites. The party submitting authorization for withdrawal of monies from the Fund must first circulate a written proposal to all other parties and the Administrator detailing the amount requested and how the money would be expended. If all parties agree to such a proposal or, if the parties cannot agree, and the Administrator determines that the proposal should be funded, the Administrator shall authorize the withdrawal of an appropriate amount from the Fund.

questionable ruling in light of RAPO § 15. Other claims of contempt are based on firmer grounds but do not warrant the extraordinary remedies invoked here. Only so much can be made, for example, of a use of first class rather than certified mail or an isolated issuance of work permits. (The majority surely makes the most of it in implying that 200 unauthorized permits were issued. The district court's finding was that 13 such permits violated the RAPO.) The failure to undertake the publicity campaign followed the administrator's failure to respond to Local 28's request for advice on the content of the campaign in light of the limited apprenticeship spaces available. Since the administrator was to supervise the campaign under the terms of the RAPO, the union's failure to go forward is rather less blameworthy than it seems to the majority. In any event, since each apprentice class had 45% minority membership, the lack of a publicity campaign seems inconsequential.

I would remand the case to the district court for a full reexamination of the contempt charges as well as of the newly revised affirmative action program. Regrettably the district judge failed to give careful scrutiny to the record or to the prior history of this case before reaching his conclusions. His legal and factual determinations with regard to the apprenticeship program were taken literally from the air and showed little understanding of what the O & J and RAPO actually provide. This is evident in his disregard of the administrator's final authority as to the size of the apprenticeship program, and also in his failure to examine the administrator's rulings with regard to reporting requirements. The newly revised program approved by the majority imposes the same kind of hard and fixed numerical requirements as were found unrealistic in the AAPO, without any serious explana-

tion of why they did not work before. Affirmance requires us to enforce the 29% goal as a fixed quota requiring the replacement of journeymen by apprentices on a strictly racial basis. Believing this to be inconsistent with our prior decisions in this matter and with Title VII itself, I dissent.

71 Civ. 2877 (HFW)
AMENDED AFFIRMATIVE
ACTION PROGRAM AND
ORDER

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP
COMMITTEE . . . SHEET METAL AND AIR-CONDITIONING
CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., ETC.,

Defendants.

Introduction

1. The parties in this case are the Equal Employment Opportunity Commission ("EEOC"), the City of New York ("City"), the New York State Division of Human Rights ("State") (collectively "Plaintiffs"), Local 28 of the Sheet Metal Workers' International Association ("Local 28"), Joint Apprenticeship Committee New York City, the Joint Apprenticeship Committee Essex-Passaic Counties, New Jersey, the Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association"), (collectively

"Defendants"), all those contractors who were named as Respondents in the civil contempt motion that was decided on August 16, 1982 and who are listed in Appendix "A" and marked with an asterisk (collectively "Respondents"), the Joint Apprenticeship Committee Nassau-Suffolk Counties, New York, the Joint Apprenticeship Committee Hudson-Bergen Counties, New Jersey,¹ Association of Sheet Metal Contractors of Northern New Jersey ("ASMCNN"), SMACNA of Long Island, Inc. ("SMACNA"), and all individual contractors listed in Appendix "A" who are currently in contractual relationship with Local 28 or who subsequently enter into such a relationship. This Amended Affirmative Action Program and Order ("AAAPO" or "Amended Program") supersedes the Revised Affirmative Action Program and Order ("RAAPO") entered on January 19, 1977.

2. This Amended Program encompasses Local 28, former Locals 10, 13, and 55 ("former locals") which merged into Local 28, the Apprentice Program and Contractors' Associations in agreement with Local 28, as stated in the Stipulation and Order dated May 17, 1983, annexed hereto as Appendix "B". Local 28's territorial jurisdiction includes New York City, Nassau and Suffolk Counties, New York, and Hudson, Bergen, Essex and Passaic Counties, New Jersey.

3. The goal of this Amended Program is to assure that Local 28's non-white² membership reaches at least 29.23%, that substantial and regular progress is made toward this goal and that all members and apprentices of Local 28 share equitably in all available employment opportunities in the industry.

4. The goal shall be measured against the total membership of Local 28, including that of the former locals. For the purpose of measurement, total membership shall include: (a) all journeymen members; (b) all pensioners, reduced or limited members who, while receiving any retirement benefit from Local 28, the Sheetmetal Workers' International Association or any

¹ "Apprentice Program" shall refer to the JACs collectively.

² "Non-white" as used in this AAAPPO means black and Spanish-surnamed individuals.

former local's pension program have been employed as sheet metal workers by a Local 28 contractor within three (3) years prior to the date of the most recent membership census; (c) all members or participants in the Apprentice Program; and (d) all individuals who (i) have been offered admission to and membership in Local 28 but have exercised their option, pursuant to Paragraph 41 of this Amended Program or pursuant to a parallel policy adopted by Local 28, to defer such admission and membership, and (ii) at the time of measurement the aforesaid deferment option has not been exercised for more than two (2) years.

5. Defendants are to implement this Amended Program so that the goal shall be attained at the earliest possible date, but no later than August 31, 1987.

6. The Amended Program shall remain in effect until such time as the membership of Local 28, including the former locals, has reached 29.23 percent and the Court, upon motion of the defendants issues an order terminating AAAPPO.

7. Until the non-white membership of Local 28 reaches 29.23%, admission to membership in Local 28 shall be attained only through:

- a) successful completion of a hands-on journeyman test administered pursuant to Paragraphs 33 through 40; or
- b) completion of the Apprentice Program pursuant to Paragraphs 8 through 27; or
- c) transfer in accordance with the International Union Constitution and Ritual; or
- d) organization of non-union shops; or
- e) the deposit of a previously obtained withdrawal card with the Executive Board of Local 28 and compliance with the relevant provisions of the International Union Constitution and Ritual.

Apprentice Programs

8. No JAC shall maintain an apprentice program longer than four years. Each JAC shall maintain an apprentice program which shall be equivalent to the program conducted by JAC-New York City. The terms and conditions of such apprentice program shall be as set forth in the Collective Bargaining Agreement ("Standard Form of Union Agreement . . . between Local 28 . . . and Sheet Metal Contractors"), and the Sheet Metal Workers' Joint Apprenticeship Committee Essex-Passaic Counties Trust and Indenture, the Sheet Metal Workers Joint Apprenticeship Committee Hudson-Bergen Counties Trust and Indenture, the Local 28 Joint Apprenticeship Committee Trust and Indenture, the Sheet Metal Workers' Local 28 Joint Apprenticeship Committee Nassau-Suffolk Counties Trust and Indenture, and the rules and regulations thereunder except as modified by the Order and Judgement ("O&J"), the provisions of this Amended Program, or orders of the Administrator pursuant to his powers under the O&J and this Amended Program.

9. a) The JACs shall utilize the standardized application form, a copy of which is annexed hereto as Appendix C. Applications for each apprentice program shall be made available to all interested persons and accepted from any qualified candidate. A qualified candidate is defined as: any person who is physically fit for sheet metal work and who has or will have attained the age of 17 by the date of indenture of the next scheduled apprentice class, is not older than 35 years of age, and is a citizen or permanent resident alien.

b) Consecutively numbered application forms for each Apprentice Program shall be available at the offices of each JAC and any union office during normal business hours and at the offices of the organizations and institutions listed in Appendix D. Application forms shall be provided automatically to the groups in Appendix D at least 30 days before the opening date for applications for each apprentice class. Defendants shall update Appendix D yearly by adding groups, including those suggested by the plaintiffs, and correcting addresses if new addresses are known. An updated Appendix D shall be submitted by the

defendants to the plaintiffs and the Administrator by September 15th of each year. Application forms shall also be made available upon request to any government employment office or minority community organization. Application forms also shall be available by mail upon written request. Completed applications shall be accepted in person or by mail at the offices of each JAC or any union office. The time for filing applications for a particular apprentice class may be closed by the Apprentice Selection Board at a reasonable time; the closing date for filing of applications shall be clearly stated on the application form and shall be uniform for all JACs. There shall be no filing fee.

10. a) Each JAC shall indenture a minimum of two classes of apprentices each year until such time as the non-white membership of Local 28 reaches 29.23%. The classes shall be indentured in February and August of each year. Each JAC shall indenture no fewer than the number of apprentices necessary to ensure that Local 28 contractors working in the respective geographical jurisdictions of the former locals and in New York City maintain a rate of one (1) apprentice for every four (4) journeymen employed in those respective territorial areas, subject to the procedures set forth in Paragraph 22.

(b) Until such time as the 29.23% non-white goal is met, selection of apprentices pursuant to Paragraph 12 shall be on the basis of one non-white apprentice for each white apprentice so indentured. Each apprentice who drops out or is terminated during the first term shall be replaced by another apprentice of the same race/national origin or, if this not possible, an additional apprentice of the same race/national origin shall be indentured in the next apprentice class.

11. Until such time as the non-white membership of Local 28 reaches 29.23%, each JAC shall maintain separate white and non-white lists of apprentices and shall indenture apprentices on the basis of one non-white for each white.

12. Until such time as the non-white member of Local 28 reaches 29.23%, selection of apprentices shall be made by a Selection Board composed of one designee each from plaintiffs, the JACs and the Court. The Selection Board shall be chaired by

the Court's designee, act by majority vote and be compensated by the JACs at an hourly rate plus expenses as determined by the Administrator and approved by the Court.

13. The Selection Board shall establish standards and procedures for selection of apprentices and shall submit such standards and procedures to the plaintiffs, Local 28, all JACs and the Contractors' Associations for their comment. Any disputes or differences regarding the standards and procedures shall be brought before the Administrator by the parties and/or any member of the Selection Board within 5 days of such dispute or difference.

14. The standards and procedures established by the Selection Board shall include, but not be limited to, review and verification of a candidate's work experience and/or technical/trade education. These standards and procedures for the selection of non-white and white apprentices shall be uniformly applied to all candidates for membership in each JAC apprentice program.

Development of Permanent Selection Procedures

15. Upon termination by court order of this AAPO, the defendants and the JACs shall use selection procedures for admission to the Apprentice Program as developed pursuant to Paragraphs 16 through 20. Such selection procedures shall be designed to have the least adverse impact on non-whites.

16. The JACs shall consult with an industrial psychologist designated by plaintiffs on the development of the new selection procedures. Plaintiffs' designated industrial psychologist will provide input in the development, review of the results, and implementation of the new selection procedures.

17. Plaintiffs' designated industrial psychologist's comments, shall be advisory only and in no way binding on defendants, their officers, employees and agents or their successors. The JACs' and plaintiffs' designated industrial psychologist shall cooperate in order to effectuate development and implementation of the new selection procedures in an efficient manner. Defendants shall furnish plaintiffs' designated industrial psychologist with

appropriate materials in a timely fashion and shall provide the industrial psychologist with a reasonable amount of time to provide his/her input.

18. Plaintiffs' designated industrial psychologist shall be paid jointly by JAC-New York City, JAC-Essex/Passaic Counties, New Jersey, JAC-Hudson/Bergen Counties, N.J. and JAC-Nassau/Suffolk, Counties, N.Y., at an hourly rate, plus expenses, as determined by the Administrator and approved by the Court.

19. The new selection procedures to be developed pursuant to Paragraphs 15 through 18 above, shall be designed to obtain quality apprentice applicants and to assure that the selection system has the least adverse impact on non-whites. The specific measures outlined below are intended to achieve this goal:

- a) The selection procedures shall be as content valid as feasible.
- b) The selection procedures shall, consistent with selection standards such as those of the American Psychological Association and the EEOC guidelines, eliminate or minimize adverse impact on non-white candidates.
- c) In developing the new selection procedures, the JACs shall consider the possibility of alternatives or supplements to written examinations, including use of oral examination or assessment center techniques.
- d) In the event that a written examination is used as part of the new selection procedures, the JACs shall consider application of one or more of the following techniques to minimize or eliminate adverse impact on non-white candidates should such adverse impact result:
 - i. Separate frequency distribution for non-white and white candidates;
 - ii. Elimination of particular items that result in statistically significant adverse racial/national origin impact among candidates of substantially equivalent ability.

iii. Addition of items to off-set the adverse impact of other items.

- e) Any selection procedure that is adopted, including the setting of cut-off scores or rank ordering features, shall be used in a manner that, consistent with validity and utility, reduces or eliminates adverse racial/national origin impact.

20. During the temporary period that the ratio in paragraph 11 is in effect, the JACs shall conduct trial runs of various selection techniques to obtain empirical data as to which valid selection method has the least adverse impact. This provision is intended to assure that when the goal is reached, there will be a valid selection method available which has, by actual usage, been shown to have the least adverse impact upon non-whites.

Apprentice Indenture

21. Prior to indenturing an apprentice class each JAC shall hold a one-day orientation for all new apprentices. Such orientation shall include discussion of the need for punctuality and reliability on the job, safety, job readiness skills and a general description of the tasks and duties apprentices will be expected to perform.

22. To ensure that it indentures the largest possible apprentice class each JAC shall assign apprentices for employment in a ratio of not less than one apprentice for every four journeymen working of the aggregate journeymen employed by Local 28 contractors in each respective JAC's territorial jurisdiction. Towards that end, each JAC shall take the following steps prior to indenturing an apprentice class:

- a) notify each employer who maintains a ratio of apprentice to journeymen of greater than one to four that it will be assigned a sufficient number of apprentices to reduce its apprentice to journeymen ratio to one to four, unless the employer, pursuant to Paragraph 43(b), obtains an exemption from the 1:4 ratio; and

- b) mail notice of apprentice assignment to contractors 45 days before a class is to be indentured; and
c) within 5 days of the mailing of apprentice assignment notices, submit to plaintiffs and the Administrator copies of such notices; and
d) within 15 days after the notices are mailed any employer requesting an exemption from the 1:4 ratio must do so pursuant to Paragraph 43(b).

These procedures are a minimum; the JACs shall take any additional steps necessary to ensure that the largest possible apprentice class is indentured.

23. Within 5 days of indenture, the Training Director shall submit to the plaintiffs the name, race/national origin, address, and social security number of each individual admitted into the JAC's apprentice program and the name, race/national origin, address and social security number of each individual who was rejected during the selection period and the reason(s) therefor.

24. Persons selected for an apprentice program may be required to appear for a physical examination prior to being indentured. The cost of physical examinations are to be borne one-half by successful applicants and one-half by the particular JAC. Persons selected in accordance with the above procedures shall be indentured as apprentices unless such indenturing is declined by them, or they are certified physically unable to perform sheet metal work by a medical practitioner licensed in New York or New Jersey.

25. Each JAC shall take all reasonable steps to insure that all apprentices indentured receive adequate employment and training opportunities. Such steps shall include, but not be limited to, providing apprentices with classroom instruction, including evenings and Saturdays where necessary, during periods of unemployment, and shall credit such hours toward fulfillment of apprenticeship requirements. Each JAC shall provide to plaintiffs, on a weekly basis, the names and attendance records of all unemployed apprentices enrolled in these classes. Advanced placement, accelerated advancement or graduation of

any apprentice may be authorized by any JAC, as it deems proper.

26. a) Each JAC shall establish an employment referral system which shall incorporate the following elements:

(i) A list of all apprentices shall be established in three groupings. Group one shall contain apprentices in terms 1, 2, 3; Group two shall contain apprentices in terms 4, 5, 6; and Group three shall contain apprentices in terms 7 and 8.

(ii) A record shall be kept for each apprentice of the actual number of hours worked³ within each group and each JAC shall refer out apprentices in inverse order to the number of hours worked (so that apprentices with the lowest number of hours shall receive referrals first).

(iii) To the extent feasible, each JAC shall rotate the groupings to insure that no one grouping or persons therein receive a disproportionate amount of work.

(iv) Each JAC shall provide counsel for the parties and the Administrator with monthly reports. Such reports shall include but not be limited to: A) all apprentices by name, race/national origin, term, grouping, actual number of hours worked, and name of contractor(s) to which the apprentice is assigned; and B) summary of manpower reports showing the number of journeymen and apprentices working for all employers.

b) Seniority among apprentices shall not be a criterion for employment.

27. Upon successful completion of an apprentice program, apprentices shall be promptly admitted to full journeyman membership upon payment of any balance due of the initiation fee. Upon application to the Executive Board of Local 28, the initiation fee may be paid on an installment basis for good cause

³ The listing of the hours worked shall be derived from the weekly reports that each employer must file pursuant to Paragraph 52.

shown and subject to the procedures contained in Paragraph 42(b).

28. Each JAC shall designate a Training Coordinator who shall be responsible for the conduct of the particular JAC's apprentice program and for all reports required to be maintained and/or filed by the O&J, this AAPO or such further orders of the Court or the Administrator.

29. Defendants shall appoint a person to serve as the Training Director. The Training Director shall be responsible for insuring that all training programs are equivalent to JAC-New York City's program and that the Training Coordinators meet their obligations as set forth in this Amended Program.

Advanced Apprentices

30. Those non-whites who scored above 55 on the July, 1982 journeyman hands-on test but who were unsuccessful in attaining journeyman membership shall be immediately offered advanced standing in the JAC-New York City's next apprentice class.

31. Those individuals who have successfully completed a sheet metal program in a vocational high school or have two years verifiable trade experience shall be considered for advanced standing in the Apprentice Program.

32. The Training Coordinator of each JAC shall evaluate the experience of all individuals who apply for advanced standing in his/her apprentice program pursuant to Paragraphs 30 and 31 and shall make placement at the appropriate grade level. The grade level assigned shall be conditional for a period to be determined by the Coordinator, not exceeding three months, based upon classroom work and on-the-job performance. If any individual cannot succeed at the advanced level, s/he shall have the option to remain in the program at a lower term. Eligible individuals who challenge the grade level assigned shall be advised in writing of their right to appeal to the Administrator.

Journeyman Test

33. Local 28 shall administer a validated, non-discriminatory, hands-on journeyman's test on the third

Saturday in October of each year for applicants residing in New York State and on the fourth Saturday in October of each year for applicants residing in New Jersey. Consistent with the requirements of the O&J and Paragraph 3 above, the Administrator or any party may apply to the Court to increase or decrease the frequency of the tests to be administered pursuant to this paragraph.

34. The 'hands-on' journeyman's test shall be graded by a Board of Examiners consisting of three members knowledgeable in sheet metal. The Board shall be comprised of a representative chosen by Local 28, a representative chosen by the Court, and a representative chosen by the plaintiffs. The Board shall act by majority vote and shall employ a passing grade level to be developed pursuant to the validation procedures. All applicants shall be advised of their status by first class mail within 30 days of the test. Applicants who fail the test shall be advised of the methods of application for the Apprentice Program.

35. The Board shall be compensated by the defendants at an hourly rate, plus expenses as determined by the Administrator and approved by the Court.

36. All qualified applicants who pass the test and are physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 within 60 days of the test.

37. Local 28 shall utilize the standardized application form, a copy of which is annexed hereto as Appendix E. Applications for each hands-on test shall be made available to all interested parties and accepted from any qualified candidate. A qualified candidate is defined as follows: any person who

- a) has or will have attained the age of 18 by the date of the test, and
- b) is a citizen or lawful permanent resident alien legally entitled to work in the United States; and
- c) has one year of sheet metal work experience as defined by the Board. Such experience shall include but be not limited to sheet metal experience in the Armed Forces, or vocational education or training related to

the skills of a journeyman sheet metal worker. Persons presently registered in the Local 28 Apprentice Program or any other recognized apprentice program affiliated with the Sheet Metal Workers' International Association are not eligible.

38. Application forms for each hands-on test shall be available at any office of Local 28 during normal business hours and at the offices of the organizations and institutions listed in Appendix D. Application forms shall be provided automatically to the groups listed in Appendix D at least 30 days before the opening date for applications for each journeyman's test. Application forms shall also be made freely available upon request to any government employment office or minority community organization. Application forms also shall be available by mail upon request. Completed applications shall be accepted in person or by mail at any office of Local 28. Local 28 shall establish a reasonable cut-off date for filing applications for the hands-on test. The closing date shall be clearly stated on the application form.

39. Within 30 days of the journeyman's test Local 28 shall submit to the plaintiffs and the Administrator the name, race/national origin, address and social security number of each individual who took the test, their score and list of the individuals who passed the test.

40. The fee for taking a hands-on journeyman's test shall be \$25.00. Local 28 may apply to the Administrator for an increase in this fee, which will be granted only upon a showing of good cause. Applicants shall be informed, in writing, as to the place of examination with instructions as to how to reach the place and/or a map indicating its location.

41. A person eligible for admission pursuant to passing a hands-on test shall be permitted to defer such admission for a reasonable time, not to exceed two (2) years. The name and race/national origin of each person who a) applies for deferral status and b) the date each deferral status is granted shall be provided the plaintiffs within ten days of the application.

Admission Fees

42. a) Upon written application, a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraph 7 of this Amended Program may request of the Executive Board of Local 28 ("Executive Board") that the Local 28 initiation fee be paid pursuant to the provisions of Paragraph 22(d) of the O&J. Within 5 days of receipt of such application, the Executive Board shall render a decision on the application in writing and notify the applicant, and the parties of the disposition of the application. If such application is denied in whole or in part, or is not acted upon within five days of its receipt by the Executive Board, an application may be made to the Administrator who shall either grant or deny the request in writing after duly considering all the factors set forth in Paragraph 22(d) of the O&J and such additional information, documents, or other data from either Local 28 or the applicant as they wish to submit.

b) Upon written application a non-white eligible for admission to journeyman membership in Local 28 pursuant to passing a hands-on test may request of the Executive Board that payment of the Local 28 initiation fee commence with employment and be payable on a pro rated basis, each payment not exceeding 10% of the net pay check, and payable only during periods of employment until the fee is paid. Within 5 days of the receipt of such application the Executive Board shall render a decision on the application in writing and notify the applicant, and all parties of the disposition of the application. If such application is denied in whole or in part or not acted upon within 5 days of its receipt by the Executive Board an application may be made to the Administrator who shall either grant or deny the application in writing.

Apprentice/Journeyman Ratio

43. a) In order to reach the 29.23% non-white membership goal as soon as practicable, each Local 28 employer shall be required to maintain a ratio of one apprentice for every four journeymen. Pursuant to this ratio, an employer would not be

required to employ a second apprentice until the employer employs an eighth journeyman.

b) An employer may be relieved of its obligation, under Paragraph 43(a), if the employer submits to the plaintiffs and the Administrator a sworn affidavit detailing the reasons for being unable to comply with Paragraph 43(a) and the plaintiffs consent in writing to a different ratio. If plaintiffs refuse to consent, they must state their reasons in writing. Any party aggrieved by actions taken under the provisions may apply to the Administrator for relief.

c) Each JAC shall immediately notify in writing any employer in its territorial jurisdiction maintaining a ratio of apprentice to journeymen greater than one to four for six consecutive weeks, that unless it files for and receives an exemption pursuant to Paragraph 43(b) that the employer will be assigned additional apprentices in order to bring its ratio down to one to four. Copies of the notices shall be mailed simultaneously to plaintiffs and the Administrator.

Permits

44. Local 28 may not issue "permits" or "identification slips" unless:

- a) a written request, Appendix "F", has been made to the plaintiffs justifying the issuance. Such request must be certified and affirmed by a union officer and the contractor subject to penalty for perjury;
- b) plaintiffs have consented in writing to the issuance, and have submitted a copy of the written request and written consent to the Administrator;
- c) if plaintiffs refuse to consent, they must state their reasons for doing so in writing; and
- d) any party aggrieved by actions taken under this provision may apply to the Administrator for resolution.

Publicity-Recruitment

45. Local 28 and the JACs shall hire an individual, individuals, or agency approved by the plaintiffs to serve as an out-reach worker(s) to the non-white community and to assist defendants in developing out-reach and recruitment programs.

46. By October 1, 1983, Local 28 and the Training Director shall provide to plaintiffs and the Administrator a written plan for an effective general publicity and recruitment campaign to inform the non-white community in Local 28's geographical jurisdiction of nondiscriminatory opportunities in Local 28 and the Apprentice Program and to ensure an available pool of non-white applicants for journeyman and apprentice membership in Local 28. This plan, which shall be in addition to the recruitment and publicity campaign defendants are required to conduct before each hands-on test and the indenturing of each apprentice class, shall include but not be limited to the following steps:

- a) during the third and fourth week of each September send a representative, and a non-white apprentice or journeyman, to all vocational and technical schools in Local 28's jurisdiction and to the organizations listed in Appendix D which in the past have provided non-white applicants to discuss what sheet metal work involves and all the procedures for admission to Local 28 and to distribute copies of the brochure/flyer developed pursuant to Paragraph 47(e); and
- b) at least once a year, hold an Apprentice Program open house at the JAC schools in New York City and Nassau-Suffolk Counties, and the union's branch offices or JAC Schools in New Jersey;
- c) at least once a year, prior to the Apprentice Program's Open House, place advertisements in the media listed in Appendix G announcing the Open House and describing sheet metal work and all the procedures for admission to Local 28 and the JACs, including the schedule for indenturing apprentice classes and the hand-on test; and

- d) on an on-going basis, advise non-whites working in non-union shops within Local 28's jurisdiction of the procedures for admission to Local 28.

Plaintiffs shall have 30 days to comment upon the written plan and to develop reporting requirements for monitoring it. The Administrator shall consider all submissions, shall revise the plan if he deems it necessary and shall order it into effect by December 1, 1983. Thereafter, the plan may be changed upon application by any party and approval thereof by the Administrator.

47. Prior to the application cutoff date for apprentice selection and the journeyman hands-on test, Local 28 and the Apprentice Program shall undertake an eight week recruitment campaign informing the non-white community of the date, location and nature of such selection methods, and the qualifications therefor. Such a recruitment campaign shall include but not be limited to:

- a) advising non-whites working in non-union shops within Local 28's jurisdiction of the procedures for admission into Local 28;
- b) visits by a representative of the Apprentice Program and a non-white Local 28 journeyman or apprentice to each of the vocational or technical schools listed in Appendix D;
- c) advertisements in the print media listed in Appendix G;
- d) requests for weekly Public Services Announcements ("PSAs") on each of the radio stations listed in Appendix G; and
- e) developing, with the approval of the plaintiffs and the Administrator, a brochure/flyer describing in some detail what sheet metal work involves and all procedures for admission into Local 28 and the JACs. During each publicity campaign the defendants shall distribute this brochure to the organizations listed in

Appendix D, and upon request to all other interested individuals and organizations.

48. Six weeks prior to the start of a recruitment campaign under Paragraph 47 defendants, with the assistance of the out-reach worker(s), shall submit to the plaintiffs for approval a written plan detailing the particulars of defendants' proposed recruitment campaign.

49. The defendants shall submit to the plaintiffs and the Administrator weekly progress reports detailing their recruitment efforts. These reports shall include, but not be limited to:

- a) the number of non-white and white applicants for the journeyman hands-on test and for each apprentice class;
- b) the name of each non-white and white applicant who claims to have completed a sheet metal program in a vocational or technical high school;
- c) the name of each non-white and white applicant who claims to have two or more years trade experience; and
- d) a listing of the sources by which applicants for the various entry methods have heard of Local 28.

Record Keeping/Reports

50. An independent statistical expert ("Advisor") may be appointed by the plaintiffs. Such advisor shall assist defendants in devising a computerized record keeping system which will generate all reports and records required pursuant to the O&J and this Amended Program. The advisor shall also, on a monthly basis, check the integrity of the data base, verify the software program, and authenticate proper entry of the raw data. The advisor shall report to plaintiffs and the Administrator on a monthly basis if that is found to be necessary for the functioning of the system and for compliance with the O&J and the AAPO. The compensation and expenses of the advisor shall be paid by defendants.

51. On March 15th and September 15th of each year, Local 28 shall submit to the plaintiffs and the Administrator both a geographical census, by former local, and a master census of its membership which shall include the following data:

- a) the total number of journeymen of Local 28;
- b) the total number of apprentices;
- c) the percentage of non-whites; and
- d) the name, address, race/national origin, social security number and number of hours worked in the prior six (6) months by each Local 28 journeyman and apprentice.

52. Each week each contractor shall submit to Local 28 and the appropriate JAC manpower reports, Appendix "H", showing, among other things, the name and social security number of each apprentice, by term, and journeyman it employed and the actual number of hours each apprentice and journeyman has worked, identification of new contracts, including start and estimated completion dates and estimated number of work-hours for: (a) apprentices; and (b) journeymen. By the 15th day of each month, Local 28 shall provide to plaintiffs and the Administrator a compilation, in summary form, of the manpower reports it receives from the employers during each week.

53. On March 15th and September 15th of each year, Local 28 shall submit to plaintiffs and the Administrator reports containing the name, address, race/national origin and social security number of apprentice graduates who obtain journeyman status.

54. On the 15th day of each month, Local 28 shall submit to plaintiffs and the Administrator reports containing the name, address, social security number, race/national origin and employer of each permit holder and for each, the date such permit was issued.

55. On March 15th, June 15th, September 15th and December 15th of each year Local 28 shall submit to the plaintiffs and the Administrator the following data:

- a) the name and race/national origin of individuals who apply to transfer into Local 28 from an affiliated sister local union;
- b) the name and race/national origin of individuals who contact Local 28 or any JAC seeking sheet metal work;
- c) the name, race/national origin and name of employer of individuals working in a sheet metal shop at the time the shop is organized by Local 28, and the date the shop was organized;
- d) the name and race/national origin of individuals who are reinstated to journeyman membership or membership in any JAC's apprentice program; and
- e) the name, race/national origin, social security number, dates of employment and hours worked during the months preceding each reporting date for each journeyman, apprentice and permit holder.

56. Each JAC shall maintain complete records of all applications and other material concerning the selection and work records of apprentices. These records shall include, but not be limited to, an applicant log for each selection showing the name, race/national origin, social security number of each applicant, dates of completion of each step in the application procedure, and disposition of each application.

57. By the 15th of each month each JAC shall submit to the plaintiffs and the Administrator the names of all apprentices who are: (a) terminated from, (b) held back, (c) suspended from, (d) laid off, (e) quit, or (f) advanced in its apprentice program or who have appeared before the JAC and the reason(s) therefor. The report shall contain the reason(s) for the action taken or the reason(s) the apprentice has quit the apprentice program as ascertained by an exit interview. Each JAC must make diligent efforts to conduct an exit interview or explain in writing the reasons why it was not conducted.

58. Defendants shall maintain all records and/or lists in the computer base which are necessary to produce all the reports required pursuant to the O&J and this Amended Program. In addition, Local 28 and the JACs, as the case may be, shall maintain separately for whites and non-whites records and lists containing the following information:

- a) applications for journeyman 'hands-on' tests;
- b) persons who apply to transfer into Local 28 from an affiliated sister local union;
- c) persons working in sheet metal shops at the time they are organized by Local 28;
- d) persons who are reinstated to journeyman membership or membership in the Apprentice Program; and
- e) persons reinstated to journeyman membership after having previously exercised withdrawal privileges.

The records and lists specified in subsections (a) through (e) of this paragraph shall contain the name, address, race/national origin, or union affiliation, if any, of each individual listed therein, as well as the date of the application, or employment (and the name of the contractor, where applicable), and the disposition with reasons, of each such application.

59. a) Should defendants or any contractors fail to mail any report required by this Amended Program within five (5) days following the date it is due, the defendant or contractor responsible for submitting the report shall be assessed a fine of \$200 per day until and including the day the required report is mailed to the plaintiffs and/or the Administrator. Any fine(s) assessed for failure to make timely reports shall be paid into the remedial Fund established pursuant to the Court's August 16, 1982 Contempt Decision and the Order dated August 31, 1983 annexed as Appendix "I".

b) In the event that a reporting requirement cannot be met, a defendant or contractor may seek an extension of time not to exceed five (5) days by sending a written request to plaintiffs

setting forth the extension sought and, in detail, the reason(s) for seeking the extension. The request for an extension must be mailed at least ten working days prior to the first due date of the report. No extension may be granted if requested after this time. A denial of a timely request for an extension may be submitted to the Administrator for determination.

60. All records and lists required to be compiled by the O&J and this Amended Program shall be maintained until such time as the Court terminates this Amended Program and shall be made available for inspection and copying by plaintiffs and the Administrator on reasonable notice during regular business hours or at any other mutually convenient time without further order of the Court. Plaintiffs and the Administrator shall be permitted access to all computer tapes containing records or reports required by the O&J or this Amended Program.

Resolution of Disputes

61. a) David Raff, Esq. shall be the Administrator under this Amended Program.

b) The Administrator shall be compensated at a rate of \$150.00 per hour and such out-of-pocket expenses as the Court may approve. These fees and expenses shall be paid by Local 28, the Contractors' Association, JAC-New York City, JAC Essex/Passaic Counties, New Jersey, and such other parties and respondents as the Court deems proper.

62. Acting at the request of any party, contractor or any interested person, the Administrator shall hear and determine all disputes concerning the operation of this Amended Program and any claim of violation of this Amended Program.

63. Any party, employer or any individual affected by this Amended Program may make a complaint to the Administrator. The Administrator shall have all parties notice of such a complaint within five days and, where a hearing is warranted, expeditiously schedule such hearing.

64. Any party may apply to the Administrator to modify, amend or add to any form contained in the appendices. Upon

good cause shown the Administrator shall take such action as he deems appropriate.

65. All Administrator's decisions shall be in writing and shall be appealable to the Court.

66. At the first apprentice class meeting of each term, all non-white apprentices shall be provided with written notice that s/he has the right to make a complaint about any matters affecting his or her employment, training, or classroom instruction to the administrator if such matters cannot be resolved by the apprentice directly with the employer or apprentice training coordinator. The notice shall further state that any employer or other person who retaliates against an apprentice for exercising any rights under this Amended Program shall be subject to a contempt of court proceeding.

Miscellaneous

67. Within 15 days following the Court's approval of this Amended Program, Local 28 shall send a copy of this Amended Program by certified mail to each contractor who currently employs Local 28 members, all Contractors' Associations, each officer, director, trustee, committee member or business agent of Local 28, JAC-New York City, JAC-Hudson/Bergen Counties, New Jersey, JAC-Essex/Passaic Counties, New Jersey, and JAC-Nassau/Suffolk Counties, New York. Service by certified mail of the O&J and this Amended Program also shall be made on any contractor who in the future employs Local 28 members. Within 10 days after such service, proof of service shall be provided to plaintiffs and the Administrator and the original thereof filed in court.

68. Pursuant to this court's Orders dated February 1, 1980, November 25, 1981 and March 24, 1982, the Administrator shall, to the extent feasible, integrate any governmentally funded training program into this Amended Program. The Administrator shall be responsible to the court for the proper implementation of both this Amended Program and any governmentally funded training program.

69. Within 30 days of the Court's approval of this Amended Program defendant Contractors' Association shall prepare an "abridged and plain English" version of the Amended Program setting forth the obligations applicable to the contractors covered hereunder. A draft shall be submitted to all the parties and the Administrator. All plaintiffs, defendants, JACs and Contractors' Associations shall have 15 days to comment thereon. Any disputes shall be resolved by the Administrator and the final version shall be mailed by defendant Local 28 to each contractor within 20 days of the Administrator's approval.

70. Nothing contained in this Amended Program should be construed as preventing Local 28's Executive Board from adopting portions of the Amended Program for the benefit of white and other minorities provided that such plans do not interfere with the operation of this Amended Program.

Dated: New York, New York
1983

SO ORDERED:

.....
U.S.D.J

Dated: New York, New York
1983

SO ORDERED:

.....
U.S.D.J

APPENDIX A

- * 1. Abbott-Sommer, Inc.
- * 2. A.A.B. Co. Sheet Metal Co.
- * 3. A Coustechs Sheet Metal Co.
- * 4. Air Damper Mfg. Corp.
- * 5. Airite Ventilating Co. Inc.
- * 6. Allen Sheet Metal Works, Inc.
- * 7. Allied Sheet Metal Works, Inc.
- * 8. Alpine Sheet Metal & Ventilating Co., Inc.
- * 9. Archer Sheet Metal Inc.
- * 10. Arrow Louvre & Damper Co.
- * 11. Baychester Roofing & Sheet Metal, Inc.
- * 12. Bayside Roofing Co., Inc.
- * 14. Brook Sheet Metal, Inc.
- * 15. Brumar Sheet Metal Corp.
- * 16. Builders Sheet Metal Works, Inc.
- * 17. Bunker Industries, Inc.
- * 18. Center Sheet Metal
- * 19. Costal Sheet Metal Corp.
- * 20. Colonial Roofing Co., Inc.
- * 21. Columbia Ventilating Co., Inc.
- * 22. Contractors Sheet Metal, Inc.
- * 23. Craft Sheet Metal Works, Inc.
- * 24. Delta Sheet Metal Corp.
- * 25. Dorite Sheet Metal
- * 26. Essex Metal Works, Inc.
- * 27. Fasano Sheet Metal Co., Inc.
- * 28. J.J. Flannery, Inc.
- * 29. General Fire Proof Door Corp.
- * 30. General Sheet Metal Works, Inc.
- * 31. Gentleman Sheet Metal Limited
- * 32. Global Services & Installation, Inc.
- * 33. Harrington Associates, Inc.
- * 34. Howard Martin Co., Inc.
- * 35. Imperial Damper & Louver Co.
- * 36. Industrial Metal Fabricators
- * 37. Karo Sheet Metal Corp.
- * 38. Kay Roofing Co., Inc.
- * 39. Kenmar Sheet Metal Corp.

- *40. K.G. Sheet Metal, Inc.
- *41. L. P. Kent Corp.
- *43. A. Munder & Son, Inc.
- *44. National Roofing Corp.
- *45. Nationwide Acoustic Foil Noise Control Products
- *46. New York Sheet Metal Work, Inc.
- *48. Penta Sheet Metal Corp.
- *49. Perfect Cornice & Roofing Co., Inc.
- *50. Pheonix Sheet Metal Corp.
- *51. Daniel J. Rice Inc.
- *52. Hugh Richards Associates, Inc.
- *53. Romar Sheet Metal, Inc.
- *54. John Schneider Roofing Contractors, Inc.
- *55. Shapiro Equipment Co., Inc.
- *56. Simpson Metal Industries, Inc.
- *57. Sobel & Kraus, Inc.
- *58. Springfield Sheet Metal Works, Inc.
- *59. Steeltown Sheet Metal & Iron Works, Inc.
- *60. Sumar Sheet Metal, Inc.
- *61. A. Suna & Co., Inc.
- *62. Louver Lite Corp.
- *63. Asco Roofing Corp.
- *64. Supreme Fireproof Door Co., Inc.
- *65. Swift Sheet Metal Co. Inc.
- *66. Swift Sheet Metal Corp.
- *67. Tempo Co. Inc.
- *68. Herman Thalman Co.
- *69. Triangle Sheet Metal, Inc.
- *70. Tropical Roofing Co., Inc.
- *71. Tuttle Roofing Co., Inc.
- *72. Universal Sheet Metal Corp.
- *73. Universal Enclosures
- *74. Wolkow-Braker Roofing, Corp.
- *75. Air-Balancing & Testing, Co.
- *76. Air-Conditioning & Balancing Co. Inc.
- *77. All Types Stacks & Chutes
- *78. Amsco Systems (American Sterilizer)
- *79. Architectural Acoustics
- *80. Associated Testing & Balancing, Inc.

- *81. Bal Test Corps.
- *82. Chimney & Chutes, Co.
- *83. Circle Acoustics Corp.
- *84. Collyer Associates, Inc.
- *85. Eastern Acoustic Corp.
- *86. Efficient Towers, Inc.
- *87. Enslein Bldg. Specialities, Inc.
- *88. Ess & Vee Acoustical Contractor, Inc.
- *89. Fisher Skylights, Inc.
- *90. International Testing & Balancing Corp.
- *91. Jacobson & Company, Inc.
- *92. Jeremiah Burns Interior Systems, Inc.
- *93. Johnson Controls
- *94. Mechanical Balancing Corp.
- *95. John Melen, Inc.
- *96. Morse Boulger, Inc.
- *97. R. H. McDermott Corp.
- *98. Nab Tern Construction
- *99. National Acoustics
- *100. Quality Erectors
- *101. William J. Scully Acoustic Corp.
- *102. Superior Acoustics
- *103. Systems Testing & Balancing, Inc.
- *104. U. S. Chutes
- *105. Wetzel Contracting Corp.
- *106. Willopee Enterprises
- *107. Wolff & Munier, Inc.
- *108. Apex Chutes & Manufacturing, Inc.
- *109. Modern Sheet Metal Works, Inc.
- *110. Calmac Manufacturing, Co.
- *111. Coolenheat
- *112. De Saussure Equipment, Co.
- *113. Industrial Acoustics, Co. Inc.
- *114. Industrial Iron & Steel
- *115. Insulcoustic/Berma Corp.
- *116. Jersey Steel Drum Mfg. Corp.
- *117. Kenco Products Corp.
- *118. Marathon Industries, Inc.
- *119. Phoenix Steel Container Corp.

- *120. Rich Manufacturing Corp.
- *121. Sternvent Co.
- 122. Air Balance N.Y.C.
- 123. Brisk Waterproofing
- 124. County Sheet Metal Constructors
- 125. 85/SMI-DNS
- 126. D.N.S. Sheet Metal Co. Inc.
- 127. Elgen Manufacturing Company
- 128. F.S.R. Sheet Metal Corp.
- 129. Governor Metal Works
- 130. Intrepid Sheet Metal & Mechanical Inc.
- 131. Modern Kitchen Equipment Corp.
- 132. Munro Waterproofing Inc.
- 133. Pike Industries
- 134. Peter Quanci
- 135. W.H. Peepels Company, Inc.
- 136. Techno Acoustics Inc.
- 137. Temp-Rite Air Conditioning Corp.
- 138. Tropical Ventilating Co., Inc.
- 139. Vern Air Contracting Co., Inc.
- 140. Weickert Sheet Metal Inc.
- 141. Wilmar Sheet Metal Corp.
- 142. Acre Sheet Metal Inc.
- 143. Air Balancing & Testing Corp.
- 144. Airmet, Inc.
- 145. Alco Sheet Metal Fabricators
- 146. Atlantic Sheet Metal Co.
- 147. B & F Heating
- 148. Bonland Industries, Inc.
- 149. B.S.R. Construction
- 150. Century Sheet Metal
- 151. Environmental Testing & Balancing Inc.
- 152. G.P. Systems
- 153. Haenssler Sheet Metal
- 154. Hart Mechanical Corp.
- 155. Midway Sheet Metal
- 156. Nationwide Installers
- 157. John P. O'Hara, Inc.
- 158. Schtiller & Plevy

- 159. Stevens Contracting Company
- 160. Tech Associates (Air Balancing)
- 161. Trinity Roofing Inc.
- 162. Quality Roofing
- 163. Ace Sheet Metal Co., Inc.
- 164. Adams Sheet Metal Co., Inc.
- 165. Air Control Experts
- 166. Arctic Sheet Metal
- 167. Allied Sheet Metal
- 168. Avon Sheet Metal Co.
- 169. Bannekar Acoustical Inc.
- 170. Benmar Conditionaire Corp.
- 171. Breure Sheet & Metal Co., Inc.
- 172. Capital Sheet Metal Co., Inc.
- 173. Effective Air Balance, Inc.
- 174. Folander Sheet Metal Co., Inc.
- 175. Max Gurtman & Sons
- 176. Halo Sheet Metal
- 177. Frank A. McBride Co.
- 178. J. Murphy Roofing & Sheet Metal, Inc.
- 179. Northeastern Air Conditioning Co.
- 180. Peters & Smith
- 181. Standard Stainless
- 182. Sweetwood, Inc.
- 183. Totowa Metal Fabricators
- 184. True Air Sheet Metal
- 185. ABC Sheet Metal Inc.
- 186. Advanced Roofing & Sheet Metal Company
- 187. Arkay Company
- 188. Max Bayroof Company
- 189. Beers Steel Erecting Corp.
- 190. Braun Equipment
- 191. Brisk Waterproofing Company
- 192. Curtis Equipment Corp.
- 193. J.B. Eurell Company
- 194. Haywood-Gordon
- 195. Hudson Food Company
- 196. In-Line Metal Fabricators
- 197. Jansons Associates

- 198. Mac Sheet Metal Co.
- 199. Monmec Incorporated
- 200. N & N Heating & Air Conditioning
- 201. Pal Sheet Metal
- 202. President Food Equipment
- 203. Sanymetal Products
- 204. Shaw Kitchen Equipment
- 205. Town Engineering Co.
- 206. A.C. Associates
- 207. A & P Sheet Metal
- 208. Battle Cloud Sheet Metal
- 209. Bayonne Stainless Products
- 210. B & P Kitchen Equipment
- 211. Crown Sheet Metal Co.
- 212. D & M Sheet Metal Co.
- 213. Gem Roofing & Waterproofing Co.
- 214. Hudson Sheet & Metal Inc.
- 215. Hutcheon & Simon Inc.
- 216. Jab Construction Enterprises, Inc.
- 217. K.L.M. Mechanical Construction
- 218. B. McGirl Inc.
- 219. National Construction Products
- 220. Owens Corning Interior Systems
- 221. J. P. Patti Company, Inc.
- 222. Henry Rader & Son
- 223. Schreck & Waelty Inc.
- 224. Tischler Brothers
- 225. A & D Steel Equipment Co., Inc.
- 226. Aberdeen Heating & Air Conditioning
- 227. Alpat Sheet Metal Corporation
- 228. Arlan Damper Corporation
- 229. Berjen Metal Industries
- 230. Botto Mechanical
- 231. Bryant Air Conditioning Contr. Inc.
- 232. Command Construction Corporation
- 233. Dunwell Heating & A/C Contr. Corp.
- 234. Echo Roofing
- 235. Envirotab
- 236. F.R.P. Sheet Metal Contr. Corp.

- 237. GFC Contracting Corporation
- 238. Grantom Mechanical
- 239. Heritage Sheet Metal Fabricators
- 240. Imperial Equipment Corporation
- 241. International Testing & Balancing
- 242. Jacobson & Co. Incorporated
- 243. H. Klien & Sons Incorporated
- 244. Lynbrook Glass & Architectural Metals Corp.
- 245. L. Martone & Sons Incorporated
- 246. ABC Mechanical Systems Corporation
- 247. Alpat Sheet Metal Corporation
- 248. Anron Air Systems Incorporated
- 249. Associated Test & Balancing, Inc.
- 250. Bass Sheet Metal Company, Inc.
- 251. Brandt-Airflex Corporation
- 252. C.A.L. Roofing Corporation
- 253. Craft Roofing Corporation
- 254. Eastern Metalworks Incorporated
- 255. Empire Deck & Siding Erectors Inc.
- 256. Exterior Building Redress Corporation
- 257. Global Partition Corporation
- 258. Hamilton Roofing & Sheetmetal Co. Inc.
- 259. Holbrook Metal Sales Corporation
- 260. Independent Metal System
- 261. Island Acoustics Incorporated
- 262. Jets Sheet Metal Incorporated
- 263. Knickerbocker Partition Corporation
- 264. Marlyn Refrigeration Corp.
- M & F Sheet Metal Corporation
- Masic Roof Maintenance Limited
- Nassau Roofing & Sheet Metal Co.
- New York Metal Erectors Incorporated
- Oyster Bay Roofing & Sheet Metal Inc.
- Park Row Roofing & Sheet Metal Contr.
- Quality Sheet Metal Incorporated
- Santo J. Ruisi Roofing Co. Inc.
- Sefi Fabricators Incorporated
- Striker Sheet Metal Incorporated
- Suffok Mechanical Corporation

Tric Sheet Metal Incorporated
 Triple S. Sheet Metal Co., Inc.
 Twin County Sheet Metal Incorporated
 Universal Sheet Metal Incorporated
 Carl H. Weber Incorporated
 A. R. Nelson Company Incorporated
 Nicholson & Galloway Incorporated
 Pace Sheet Metal Incorporated
 Prospect Roofing Company Incorporated
 Rosenblatt & Thompson
 R. & S. Metal Products & Fireplace
 Company
 Spanos Acoustics Co., Inc.
 Suffolk Mechanical Corporation
 Town Metal Works Incorporated
 Triple M Roofing Corporation
 Triple State Sol-Aire Corporation
 United Metal Systems Incorporated
 A. Wachsberger Roofing & Sheet Metal

APPENDIX B

71 CIV. 2877 (HFW)
 STIPULATION AND ORDER
 DATED MAY 17, 1983

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
 THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
 INTERNATIONAL ASSOCIATION, and LOCAL 28 JOINT
 APPRENTICESHIP COMMITTEE . . . SHEET METAL and AIR
 CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK
 CITY, INC.

DEFENDANTS.

WHEREAS, former Locals 10, 13, 55 and 559 have merged into
 Local 28 pursuant to directive of General President of the Sheet
 Metal Workers' International Association AFL-CIO; and

WHEREAS, an order dated April 25, 1983, has been entered in a
 certain Civil Action No. 487-69(MHC) in the United States
 District Court, District of New Jersey, entitled "United States
 Department of Justice-against-Sheet Metal Workers'
 International Association, Local Union 10, The Joint
 Apprenticeship and Training Committee of the Sheet Metal

Contractors' Association of Essex and Passaic Counties, New Jersey and Local 10 of the Sheet Metal Workers' International Association" transferring jurisdiction over same to the United States District Court, Southern District of New York (Judge Henry F. Werker); and

WHEREAS, collective bargaining agreements between former Local 10 of Essex/Passaic Counties, New Jersey, former Local 13 of Hudson/Bergen Counties, New Jersey and former Local 55 of Nassau/Suffolk Counties, New York and their respective signatory employers were assumed by Local 28; and

WHEREAS, the terms of these collective bargaining agreements provided for the creation and continuance of Joint Apprenticeship Committees ("JACs") in the geographical areas served by each of these former locals, being comprised of employer and union representatives; and

WHEREAS, by reason of the existing collective bargaining agreements Local 28's Apprentice Program consisting of JAC-New York City, JAC-Nassau/Suffolk Counties, and JAC Essex/Passaic Counties, New Jersey (the latter three herein referred to as the "merged JACs") is entrusted with the operation of an apprentice training program to meet the needs and requirements of the sheet metal trade; and

WHEREAS, it has been represented that JAC-Essex/Passaic Counties, New Jersey, and JAC-Hudson/Bergen Counties, New Jersey neither maintain apprentice schools nor formally indenture apprentice classes at regular intervals, but instead place apprentice applicants in an on-going sheet metal course given at the Essex County Vocational School and the Hudson County Vocational School, respectively, for training as job opportunities become available; and

WHEREAS, it has been represented that JAC-Nassau/Suffolk Counties New York does not formally indenture apprentice classes at regular intervals, but instead trains applicants in an on-going sheet metal course at its own facility as job opportunities become available; and

WHEREAS, it has been represented that the merged JACs cannot strictly comply with the provisions of the Order and

Judgment ("O&J") and the Revised Affirmative Action Program and Order ("RAAPO").

It is hereby Stipulated and Agreed by, between and among the undersigned that the O&J and the RAAPO are binding upon Local 28, JAC-New York City, JAC-Essex/Passaic Counties New Jersey, JAC-Hudson/Bergen Counties New Jersey, JAC-Nassau/Suffolk Counties New York, the Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc., SMACNA of Long Island, Inc., and the Association of Sheet Metal Contractors of Northern New Jersey.

It is further Stipulated and Agreed that Local 28's Apprentice Program ("Program") is comprised (i) JAC-New York City (ii) JAC-Nassau/Suffolk Counties, New York (iii) JAC-Essex/Passaic Counties, New Jersey. Except as provided in this Stipulation and Order, a Class to be indentured by the Program shall consist of apprentices placed in the various JAC's training courses as set forth herein.

It is further Stipulated and Agreed that until the effective date of a new affirmative action program approved by the Court or unless otherwise indicated herein, the O&J and RAAPO are modified as follows

1. Pursuant to RAAPO Section 18 each merged JAC shall maintain an apprentice program of four (4) years duration or less. The terms and conditions of each apprentice program shall be set forth in each collective bargaining agreement between Local 28 and sheet metal contractors, in the Joint Apprenticeship Trust and Indenture and the rules and regulations thereunder except as modified by the O&J, the RAAPO or order of the Administrator and as further modified in this Stipulation and Order.

2. a) Upon the effective date of this Stipulation and Order and until the next Class of the Program is indentured, the merged JACs shall continue to maintain their respective on-going training courses and to place applicants in those courses as job opportunities become available. Apprentice applicants shall be selected on the basis of one non-white to one white.

b) Until the next Class of the Program is indentured, as jobs become available with employers of the merged locals, before indenturing any new apprentices, each merged JAC must first offer the job to unemployed JAC-New York City apprentices, who must reject the offer.

c) Until the next Class of the Program is indentured, no merged JAC shall indenture more than ten (10) apprentices without the prior written approval of the Administrator.

3. RAAPO Sections 19(b) and (c) are modified to provide that each merged JAC shall forward its recommendation for the number of applicants to be indentured in its on-going training course no later than ten (10) days before the date of indenture to counsel for the parties and the Administrator. Any objections to the recommendations shall be submitted to all other parties and the Administrator no later than five (5) days after the receipt of the JAC's recommendations.

4. RAAPO Section 20(b) is modified to provide that the merged JACs shall make every effort to provide classroom instruction during periods of unemployment and shall credit such hours toward fulfillment of apprenticeship requirements.

5. RAAPO Section 20(c)(iv) is modified to provide that commencing June 1983 the merged JACs shall submit monthly reports which shall include all apprentices by name, ethnic status, term, grouping and name of contractors that the apprentices are assigned to.

6. RAAPO Sections 20(d)(i) and (iii) shall not be applicable to the merged JACs.

7. RAAPO Sections 23 and 24 and O&J Section 21(b) and (c) are modified to provide that until the next Class of the Program is indentured, the procedure for the use and distribution of the merged JACs respective application forms for applicants to their on-going training courses shall remain in effect.

8. RAAPO Sections 25(a), (b), (c), 26 and 27 shall not be applicable to the merged JACs.

9. RAAPO Sections 29, 30, 31 (a) - (f) and 32 and O&J Section 22(c) shall not be applicable to the merged JACs.

10. RAAPO Sections 35(b) and (c) are modified to provide that six (6) months after the effective date of this Stipulation and Order and at intervals of six (6) months thereafter, each merged JAC shall furnish a report giving the names of all non-white apprentices and the names of the contractors to which each was referred. Such report shall be a summary of the reports required to be filed monthly pursuant to RAAPO Section 20(c) as modified herein.

11. O&J Section 21(j) as modified to provide for such amendments or modifications as set forth in this Stipulation and Order.

12. Commencing June 1983, Local 28 and the JACs shall maintain and submit such information as set forth in RAAPO Sections 33(a) - (p) and O&J Section 21(e).

13. Apprentices who have completed or shall complete their respective training courses in the merged JACs are considered journeymen members of Local 28 upon the payment of their initiation fees.

14. The parties hereto reserve their right to appeal from any order or judgment of the Court including but not limited to a modification of the RAAPO or a new affirmative action plan.

Dated: New York, New York
May 17, 1983

FREDERICK A. O. SCHWARZ, JR. LOCAL 28
SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION
Corporation Counsel
Attorney for Plaintiff
City of New York
100 Church Street
New York, New York 10007

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By: BY:
CHARLES R. FOX

SPENCER H. LEWIS JOINT APPRENTICESHIP
Acting Regional Attorney COMMITTEE-NEW YORK CITY -
E.E.O.C.
90 Church Street
New York, New York 10007

By: BY:
RICARDO CUEVAS

A-92

ROBERT ABRAMS
Attorney General
2 World Trade Center
Room 45-08
New York, New York 10047

JOINT APPRENTICESHIP
COMMITTEE - ESSEX - PASSAIC
COUNTIES, NEW JERSEY

By: BY:
SHEILA ABDUS-SALAAM

JOINT APPRENTICESHIP
COMMITTEE
- HUDSON - BERGEN
COUNTIES, NEW JERSEY

By:

JOINT APPRENTICESHIP
COMMITTEE
- NASSAU - SUFFOLK
COUNTIES, NEW YORK

By:

SMACNA OF LONG ISLAND,
INC.

By:

A-93

APPENDIX C

JOINT APPRENTICESHIP COMMITTEE & TRUST APPLICATION FOR APPRENTICE PROGRAM

No. _____
How did you hear about
Local 28?

(Community Center, Flyer,
Friend, Local 28 - Please circle or
write in others.)

All information will be held in strictest confidence.

PLEASE PRINT

1. Name _____ 2. Soc. Sec. # _____
3. Address _____
c/o _____ Apt. # _____
4. City _____ State _____ Zip Code _____
7. Date of Birth _____ Age _____ 8. Telephone No. _____
9. Race/National Origin (Check One) - Black - Caucasian
(To comply with Federal Court Order)
_____ Spanish-Surnamed _____ Asian
_____ American Indian _____ Other
10. Have you ever served in the armed services? _____
If yes, date entered _____ Date discharged _____
What was your job in the service? _____
- What is your present condition of health? _____
12. Describe any physical disabilities _____
13. Are you a U.S. citizen or resident alien who is allowed to
work (green card.)? _____

14. Trade work experience, if any. (Add additional pages, if needed.)

Employer: _____ Telephone #: _____

Address: _____

Description of your job: _____

Types of tools or equipment you used: _____

Dates of employment: From _____ To _____

15. Formal vocational education, if any.

School: _____

Address: _____

Description of course: _____

Dates attended: From _____ To _____

School: _____

Address: _____

Description of course: _____

Dates attended: From _____ To _____

16. List any math, blue printing reading, mechanical drawing, or drafting classes you completed after the 9th grade. _____

17. If you have six months or more of either previous experience or vocational education in sheet metal construction work, do you wish to apply for advanced placement? The age for advanced placement is extended to thirty-five (35)?

YES _____ NO _____

18. Are you enrolled or have recently been enrolled in an apprenticeship program? _____

19. Is there anything else about yourself that you would like to tell us, such as: special skills, hobbies, crafts, community work, etc.?

I authorize investigation of all the statements contained in this application. I understand that willful misrepresentation of information or intentional deletion of pertinent information called for in this application will be sufficient cause for rejection from consideration as an applicant or immediate dismissal from the Apprentice Program. Further, I understand and agree, if I am accepted into the Apprentice Program, that my employment is for no definite period. I agree, if an apprentice, that I shall comply with all the terms and conditions set forth by the J.A.C. I certify that the information given above is correct and true.

Date

Signature of Applicant

SEND APPLICATION BY _____, 1983

APPENDIX D

New York State Division of Employment
 (Department of Labor)
 Department of Employment of the City of New York
 Bureau of Labor Services of the City of New York
 Recruitment and Training Program Inc. (RTP)
 Fight Back
 Black Economic Survival
 Regional Neighborhood Manpower Services Centers of
 New York City
 New York City Board of Education (Public High School and
 Evening Trade Division)
 New York Urban League
 National Association for the Advancement of Colored People
 National Association for Puerto Rican Civil Rights
 New York Project Equality
 Commonwealth of Puerto Rico
 Opportunities Industrialization Center of New York, Inc.
 Bedford Stuyvesant Restoration Corp.
 New York City Human Rights Commission
 New York State Division of Human Rights
 Commonwealth of Puerto Rico Department of Labor,
 New York City
 All-Craft Foundation
 New York City Association of Women in Construction
 State Communities Aid Association
 Non-traditional Employment for Women
 National Puerto Rican Forum

New York Urban Coalition
 Aspira
 Private Industry Council
 Economic Opportunity Center of Nassau, Inc.
 Economic Opportunity Center of Suffolk, Inc.
 Local Action Center of Riverhead
 Ms. Mary Treadwell
 La Union Hispanica de Suffolk
 North Hempstead Community Development
 Wyandach Community Development Corporation
 Rural New York Farmworkers, Inc.
 Circulo de la Hispanidad, Inc.
 Urban League of Long Island
 L.I. P.R.E.P.
 Long Island Affirmative Action Programs, Inc.
 Ralph McKee Evening Trade School
 Bergen Vocational Technical School
 Chelsea Vocational High School
 Manhattan Vocational-Technical High Schools
 William Grady Vocational High School
 Thomas Edison Vocational
 William Grady Vocational
 Queens Evening Trade School
 Manhattan Trade School
 Brooklyn Technical Evening Trade School
 Boards of Cooperative Educational Service

Bureau of Apprenticeship and Training (N.Y.S. Department of Labor)

Union Free School District of Mineola

National Organization of Women — South Shore Chapter

National Organization of Women — Nassau Chapter

Human Resources Development Institute

Apprenticeship Outreach Program

APPENDIX E

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION APPLICATION FOR JOURNEYMAN "HANDS-ON" EXAMINATION

No. _____

How did you hear about
Local 28? _____

(Community Center, Flyer,
Friend, Local 28 — Please circle or
write in others.)

All information will be held in strictest confidence.

PLEASE PRINT

1. Name _____ 2. Soc. Sec. # _____

3. Address _____

4. City _____ State _____ Zip Code _____

5. Date of Birth _____ Age _____ 6. Telephone No. _____

7. Race/National Origin (Check One) — Black — Caucasian

(To comply with Federal Court Order)

_____ Spanish-Surnamed _____ Asian

_____ American Indian _____ Other

8. Have you ever served in the armed services? _____

If yes, date entered _____ Date discharged _____

9. Describe any physical disabilities _____

10. Are you a U.S. citizen or resident alien who is allowed to
work (green card.)? _____

11. Trade work experience or vocational experience, if any.

Employer or Vocational School	Address/ Phone #	Date Employed or Attended	Kind of Work tools used

13. Please describe any other related experience or training in construction.

14. Are you enrolled in an Apprenticeship Program affiliated with the Sheet Metal Workers' Association?

I authorize investigation of all the statements contained in this application. I understand that willful misrepresentation of information or intentional deletion of pertinent information called for in this application will be sufficient cause for rejection from consideration as an applicant or immediate dismissal from the Union. Further, I understand and agree, if I am accepted into the Local 28, that my employment is for no definite period. I agree, that I shall comply with all the terms and conditions set forth by the Local Union 28 and the Sheet Metal Workers' International Association's Constitution and Ritual. I certify that the information given above is correct and true.

Date

Signature of Applicant

SEND APPLICATION BY _____, 1983

APPENDIX F

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION
LOCAL UNION NO. 28
1790 BROADWAY
NEW YORK, NY 10019

REQUEST FOR PERMIT MEN

1. NAME OF EMPLOYER: _____

ADDRESS: _____

PERSON TO CONTACT: _____

PHONE: _____

2. CURRENT EMPLOYEES: Number of Journeymen _____

Number of Apprentices _____

3. EFFORTS TO OBTAIN JOURNEYMEN:

Name and race/ national origin of each Local 28 Unemployed Journeyman	Period Unemployed	Date(s)		Date Offer of Work Was Rejected
		Local 28 Contacted Unemployed Local 28 Journeyman Re. Job	Date(s) Contractor Contacted Local 28 Re. Job	

4. a) Number of apprentices requested in past six months: _____

b) Number of apprentices hired in past six months: _____

5. NUMBER OF PERMIT MEN REQUESTED: _____

6. IS A SPECIAL SKILL NECESSARY FOR THE JOB THE PERMIT MAN IS TO BE ASSIGNED TO? IF SO, WHAT IS THAT SPECIAL SKILL?

7. APPROXIMATE LENGTH OF TIME PERMIT MEN WILL BE EMPLOYED: _____

8. APPROXIMATE DATE WHEN COMPANY FIRST EXPERIENCED DIFFICULTY OBTAINING JOURNEYMEN FOR JOBS: _____

9. LIST MAJOR JOBS UNDER CONTRACT:

The undersigned hereby certify and affirm under penalty of perjury that diligent efforts were made by this employer and union to hire Local 28 members to fill the positions requested and these efforts have failed.

SIGNATURE OF EMPLOYER
TITLE: _____

DATE

SIGNATURE OF UNION OFFICER
TITLE: _____

DATE

APPENDIX G

Non-White Media in Local 28s Jurisdiction

Amsterdam News
2340 Frederick Douglas Boulevard
New York, New York
678-6000

El Diario-La Prensa
181 Hudson Street
New York, New York 10013
966-5040

New Jersey Afro American Newspaper
11 Hill Street
Newark, New Jersey
(212) 622-2043

Impacto Latin News
1247 A St. Nicholas Avenue
568-7957

El Mundo Newspaper De Puerto Rico
41 East 42nd Street
682-0886

Harlem Weekly
401 5th Avenue
New York, New York
532-8300

Big Red
200 West 57th Street
New York, New York
944-2233

The Black American
41 Union Square
New York, New York
255-5046

WBGO FM Newark
WNJR AM Newark

New York City

WLIB (FM)(AM)

WWDJ (FM)

WWRL (FM)

WYSR Stamford, Conn. (FM)

WADO (AM)

WBNX (AM)

WHOM (AM)

WBLS (FM)

APPENDIX H

WEEKLY CONTRACTOR REPORT

Date: _____

1. NAME OF EMPLOYER: _____

ADDRESS: _____

PERSON TO CONTACT: _____

PHONE: _____

2. JOURNEYMAN EMPLOYMENT CHART:

<u>Name of each journeyman</u>	<u>Race or National Origin*</u>	<u>Hours Worked**</u>
--	---	-----------------------

3. APPRENTICE EMPLOYMENT CHART:

<u>Name of each apprentice</u>	<u>Term</u>	<u>Race or National Origin*</u>	<u>Hours Worked**</u>
--	-------------	---	-----------------------

4. PERMIT EMPLOYMENT CHART:

<u>Name of each Permit Holder</u>	<u>Original Local</u>	<u>Race or National Origin*</u>	<u>Hours Worked</u>
---	---------------------------	---	---------------------

5. During the past week, have you bid for any new contracts:

Yes: _____

No: _____

* White = "W"
 Black = "B"
 Spanish Surnamed = "SS"
 Other = "O"

** Include all overtime

6. During the past week, have you been awarded any new contracts:

Yes: _____ No: _____

If yes, list below the name, address, and telephone number of the awarding agency or company, the contact person at each, and the location of the construction site:

7. How many hours of work will the job take for:

Journeyman _____

Apprentices _____

Number of Journeymen needed: _____

Number of apprentices needed: _____

8. On what date will the work begin: _____

What date is completion of work expected _____

9. Has there been a change on any of the above items on a contract previously awarded and for which a Contractor's Report was filed:

Yes: _____ No: _____

If yes, attach an amended report to this report.

10. List all jobs now under contract:

The undersigned hereby affirms under penalty of perjury that the above information is true and accurate.

.....
Date Signature of Employer

.....
Title

71 CIV. 2877 (HFW)
 AMENDED PROCEDURES
 FOR IMPLEMENTING THE
 ORDER ESTABLISHING
 AN EMPLOYMENT,
 TRAINING, EDUCATION
 AND RECRUITMENT FUND

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and
 THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . , LOCAL 28 OF THE SHEET METAL WORKERS'
 INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP
 COMMITTEE... SHEET METAL and AIR CONDITIONING
 CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

Defendants.

HENRY F. WERKER, D.J.

By order dated August 31, 1983, this Court established the Local 28 Employment, Training, Education and Recruitment Fund (the "Fund Order"). To carry out the directives of the Fund Order,

It is hereby ORDERED that:

1. The Fund account is to be a separate account of the Sheet Metal Workers' Union, Local 28 Education Fund. The sole purpose of this account shall be for the receipt of monies to be paid into the Fund pursuant to the Fund Order, and disbursement of such monies as are permitted by the terms of the Fund Order and the Procedures established herein.

2. In order to effectuate the Fund Order or these procedures, the Trustees of the Education Fund shall take any action directed by the Administrator, including but not limited to, issuing any necessary resolutions or making any amendments to the Trust Indenture.

3. Pursuant to terms of the Fund Order, monies may be drawn from the Fund account only upon a two-signature authorization with the Administrator being a necessary signatory.

4. The Administrator shall establish a separate operating checking account to carry out the day-to-day operations of the Fund. Monies shall be transferred from the interest-bearing Fund account to the operating account pursuant to the following:

A. The Administrator shall develop and submit to the City, State and EEOC an annual line item budget detailing the sums of monies to be spent for each of the Fund's functions, staff, administrative and overhead costs. Copies of the budget shall be provided to all other parties.

B. Upon receipt of the Administrator's proposed budget, the parties shall have twenty (20) days to submit to the Administrator their comments and/or objections. After review of the comments and/or objections, the Administrator shall issue a final budget. Any party may appeal the Administrator's final budget, within ten (10) days of its issuance, to the Court.

C. Upon issuance of the final budget, monies shall be transferred from the Fund account to the operating account on a semi-annual basis.

D. In the event that either the Administrator or a party believes that monies in addition to the final budget need to be drawn, or a new item must be added to the budget, or

there is a need for an adjustment within the budget, the Administrator or requesting party shall submit to all other parties a proposed budget modification. The other parties shall offer their comments and/or objections to the Administrator within twenty (20) days of receipt of the proposed budget modifications. The right of appeal shall be pursuant to subparagraph B above.

E. The fidelity bond required by the Fund Order shall be in an amount of not less than \$400,000 for each individual covered by such bond.

5. The City, State and EEOC shall monitor the operations of the Fund and shall have access to the Fund's staff to discuss any matters related to the Fund's operation. The City, State and the EEOC shall also have the right, at any time, to inspect the books and records of both the Fund account and the operating account.

6. A certified accounting firm shall be retained by the Administrator to thoroughly review the bookkeeping for the Fund and such firm shall conduct an annual audit of the Fund's financial records. A financial statement of the annual audit shall be submitted to the court and all parties once each year for every year that the Fund remains in existence.

Dated: New York, New York /s/ HENRY F. WERKER
October , 1983 U. S. D. J.

MEMORANDUM & ORDER
71 CIV. 2877 (HFW)

**United States District Court
Southern District of New York**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP
COMMITTEE. . . SHEET METAL and AIR CONDITIONING
CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

Defendants.

HENRY F. WERKER, D.J.

Pursuant to the court's directive in its Memorandum & Order dated April 11, 1983, plaintiffs, the Equal Employment Opportunity Commission ("E.E.O.C.") and the City of New York ("City"), have submitted a proposed Amended Affirmative Action Program and Order ("AAAPO"). As required by the court's Memorandum & Order, the Administrator participated in the preparation of the AAAP. The State of New York ("State"), which originally was named as a defendant in this action, but subsequently was realigned with plaintiffs, also took part in the formulation of the AAAP. The E.E.O.C. and the City now move for an order approving the AAAP. In response,

defendants have submitted and seek approval of their own Amended Affirmative Action Program and Order.

The court approves plaintiffs' AAAP, subject to the changes that the court has made on its copy of the AAAP, and rejects defendants' proposed Amended Affirmative Action Program and Order. In reaching that decision, the court has read and considered the papers submitted by the E.E.O.C. and the City, the Administrator, the State and defendants. The court also has made use of the twelve years of experience it has had in this case.

The major change that the court has made to the AAAP is to eliminate the provisions for apprenticeship examinations. It repeatedly has been claimed that these tests impact adversely on non-whites. Any agreement as to their validity appears to be impossible. Moreover, the examinations are costly to administer. The court finds that the violations that have occurred in the past have been so egregious that a new approach must be taken to solve the apprentice selection problem. Therefore, the court has adopted a selection method that should provide credible results without the need for formal examinations.

It is the court's hope that, as a result of the fines that it has and will assess, defendants will conclude that it is too expensive to continue to violate the court's orders and will make a real and substantial effort to bring an end to the obvious and pernicious discriminatory practices that permeate this trade.

Plaintiffs, together with the State and the Administrator, are directed to revise the AAAP in accordance with the changes made on the court's copy of the AAAP and to submit it to the court within ten (10) days of the entry of this Order.

SO ORDERED.

Dated: New York, New York/s/ HENRY F. WERKER.....
August 31, 1983 U. S. D. J.

ORDER ESTABLISHING AN
EMPLOYMENT, TRAINING,
EDUCATION AND
RECRUITMENT FUND
71 Civ. 2877 (HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP
COMMITTEE . . . SHEET METAL AND AIR CONDITIONING
CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

Defendants.

HENRY F. WERKER, D. J.

The Court, on August 16, 1982, having held defendants Local 28, the Joint Apprenticeship Committee ("JAC") and the Sheet Metal and Air Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association") in civil contempt ("contempt decision") for their failure to comply with the Order and Judgment entered on August 28, 1975 ("O&J") and the Revised Affirmative Action Program and Order entered on January 19, 1977 ("RAAP"), and

The Court having imposed a fine upon defendants, and having directed that such fines be placed in a Fund "for the purpose of developing the apprenticeship program with an eye toward increasing the non-white membership of the program and the union," and

The Court having found that an additional fine was necessary to coerce future compliance, and

The Court having determined that additional fines should be imposed upon Local 28 and the JAC as the result of the Court's adoption on August 21, 1983 of the Administrator's Memorandum Decision dated May 18, 1983 ("memorandum decision"), in which he found that these defendants further had violated the O&J and the RAAPO,

It hereby is ORDERED that:

1. There shall be established an interest-bearing account at the Manufacturers Hanover Trust Company located at 277 Broadway, New York, New York to be called "the Local 28 Employment, Training, Education and Recruitment Fund" ("Fund"). This Fund shall be used for the purpose of remedying discrimination. The Fund shall be administered by plaintiffs and the Administrator jointly with two-signature control. This Fund shall be in addition to any funds already established by defendants for the purpose of promotion, employment, training, education and recruitment, and shall be used solely for the benefit of nonwhites.

2. A fidelity bond shall be filed on behalf of plaintiffs and the Administrator to cover the administration of the Fund. The expense therefor shall be paid by defendants annually in addition to any other expenses or fines imposed.

3. The Fund shall remain in existence until the goal set forth in the Amended Affirmative Action Program and Order ("AAAPO"), which the Court today has approved, is achieved and until the Court determines that it is no longer necessary.

4. The monies for the Fund shall come from the following sources:

- a. Defendant Local 28, which was found in contempt by the Court's August 16, 1982 contempt decision, shall pay into the Fund on a quarterly basis two cents (\$0.02) for each journeymen and apprentice hour worked, including overtime. This amount shall increase, on each anniversary date of this Order, at a rate of two-tenths of one cent (\$0.002) per year until the Fund is terminated by the Court. Such payment shall be in lieu of both the coercive fines ordered by this Court in the contempt decision, and a fine for the violations of the O&J and RAAPO as found in the Administrator's May 18, 1983 memorandum decision.
- b. The Contractor's Association and the JAC, which were found in contempt by the Court's August 16, 1982 contempt decision, shall pay, on a monthly basis, all staffing, out-of-pocket and overhead costs related to the administration of the Fund and the programs created thereunder, and any governmentally funded training program. Such payment for the Contractor's Association and the JAC shall be in lieu of the coercive fines ordered by the Court in the contempt decision. In addition, the JAC's share shall be in lieu of a fine for the violation of the RAAPO as found in the Administrator's May 18, 1983 memorandum decision.
- c. The fines previously imposed upon any defendant shall be paid into the Fund.
- d. Any fines that may be imposed after the date of this Order against any defendant, employer or respondent for violation of any provision or term of the Court's or the Administrator's orders shall be paid into the Fund.
- e. Plaintiffs may elect to pay into the Fund any attorney's fees awarded in this case.
- f. Contributions from any Local 28 employer who wish to contribute towards the advancement of the AAAPPO shall be paid into the Fund.

5. Upon termination of the Fund:
 - a. plaintiffs shall recover any remaining funds, up to the amount paid in, pursuant to paragraph 4(e) above; and
 - b. defendants, upon approval of the Court, may recover any remaining funds over the amount returned to plaintiffs.
6. The Fund shall be used for the following purposes:
 - a. Establishing a tutorial program of up to 20 weeks duration for nonwhite first-year apprentices.
 - b. Creating part-time and summer sheet metal jobs for nonwhite youths between the ages of 16 through 19 who are currently enrolled in or have successfully completed, within the past year, a sheet metal vocational or technical education program or a program in an allied trade requiring the use of tools, math or drafting, such as carpentry.
 - c. Paying the expenses, including any lost wages, of nonwhite members and apprentices of Local 28 for their services as liaisons to vocational and technical schools having sheet metal programs. The duties of the liaisons shall include, but not be limited to, the following: working with the schools to upgrade the sheet metal program, arranging trips to sheet metal shops and field sites, counseling the students on methods of entry into Local 28 and working with participants in the program set forth in paragraph 6(b) above. The JAC training coordinators and union officials shall cooperate fully with the liaisons in the effort to carry out this program.
 - d. Appointing a counselor or counselors, whose duties shall include, but not be limited to, the following: monitoring the progress of nonwhite apprentices at each JAC school and on the job, providing nonwhite apprentices with personal and job-related counseling and assisting nonwhite apprentices in adjusting to

- their school and work environments to help ensure their successful completion of the Apprenticeship Program. The counselor(s) shall be selected and supervised by the Administrator subject to approval by plaintiffs and the Court. Defendants and all Local 28 contractors shall cooperate fully with the counselor(s). Every two months, and at the end of each apprenticeship term, the counselor(s) shall submit to the parties, the Administrator and the Court a report detailing the progress of nonwhite apprentices and setting forth recommendations to resolve any problems nonwhite apprentices may be encountering.
- e. Providing stipends to unemployed nonwhite apprentices while they attend their regular apprentice class and any additional classes that will be offered to such apprentices pursuant to the AAAPPO.
 - f. Establishing a low-interest loan fund for nonwhite first-term apprentices who demonstrate financial need.
 - g. Providing stipends to unemployed nonwhite journeymen while they take advanced courses to upgrade their skills.
 - h. Providing financial reimbursement to any employer who has demonstrated to plaintiffs' satisfaction that it cannot afford to hire an additional apprentice to meet the one-apprentice-to-every-four journeymen requirement of the AAAPPO.
 - i. Providing incentive or matching funds to attract additional funding from governmental or private job training programs, such as the Dislocated Worker Program established pursuant to Title III of the Job Training Partnership Act, 29 U.S.C. §§1651-1658.
 - j. Additional expenditures may be made from the Fund upon a showing by any party that such an expenditure would serve to increase the nonwhite membership of the union and the Apprentice Program, or to provide

support services to nonwhites. The party submitting authorization for withdrawal of monies from the Fund must first circulate a written proposal to all other parties and the Administrator detailing the amount requested and how the money would be expended. If all parties agree to such a proposal or, if the parties cannot agree, and the Administrator determines that the proposal should be funded, the Administrator shall authorize the withdrawal of an appropriate amount from the Fund.

7. The Administrator is empowered to take appropriate action to assure the implementation of this Order and to hear and decide any complaints thereunder.

8. This Order is supplementary to the relief mandated by the O&J and the RAAPO and shall be included, by reference, in the AAAPPO and in any new affirmative action program that may be entered in this action.

SO ORDERED.

DATED: New York, New York /s/ HENRY F. WERKER
August 31, 1983 U.S.D.J.

MEMORANDUM & ORDER
71 CIV. 2877 (HFW)

**United States District Court
Southern District of New York**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . , LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, and LOCAL 28 JOINT
APPRENTICESHIP COMMITTEE . . . SHEET METAL and AIR
CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK,
INC., *et al.*,

Defendants.

HENRY F. WERKER, D.J.

After trying this case from January 13, 1975 through February 3, 1975, the court concluded that the imposition of a nonwhite membership goal was necessary to correct defendants' past discriminatory practices and set the goal at 29%. *E.E.O.C. v. Local 638*, 401 F. Supp. 467, 488-89 (S.D.N.Y. 1975), *aff'd as modified*, 532 F.2d 821 (2d Cir. 1976). Subsequently, Locals 10, 13 and 55 were merged into Local 28. The court therefore directed the parties to submit information on any impact that the merger had on the goal originally set by the court. The parties have done so and have employed the services of experts to

support their respective contentions. Based upon the studies conducted by Dr. Harriet Zellner, plaintiffs assert that the goal should be adjusted to somewhere between 33% and 41%. Defendants, on the other hand, claim that the goal should be reduced to 21.7%, relying on the conclusions of Dr. Richard G. Buchanan.

Turning first to defendants' position on the goal, the court finds that Dr. Buchanan's studies are so infested with improper calculation methods that his findings must be rejected. To begin with, Dr. Buchanan has defined the relevant labor pool in terms of males 25 years of age and older possessing sheetmetal work skills. With respect to the age group, the court determined in its post-trial opinion that the starting age of the relevant labor pool was 18. 401 F. Supp. 467, 488-89. Nothing has happened since that time that would justify a change in that determination. Indeed, it was established long ago that 90% of Local 28's journeymen enter through the apprentice program. Under the rules of that program, the applicant must be 18 to 25 years of age at the time of admission. The court therefore finds that the age of entry into the pool should remain at 18. Furthermore, because the overwhelming majority enter through the apprentice program where they acquire the requisite skills, the relevant labor pool cannot be restricted to those already possessing sheetmetal work skills. Rather, the pool must include those most likely to enter the apprentice program, who, in this case, are blue collar workers (operatives and laborers).

In addition, Dr. Buchanan improperly has employed a weighting procedure to determine what the goal should be. What he did was to ascertain the percentage of nonwhites to the total number of persons within his defined labor pool for each of the 25 counties from which the merged locals draw their members. He then gave each county a weight that was premised upon the number of journeymen and apprentices residing in that county. The nonwhite ratio for each county was then multiplied by the weight assigned to that county. The goal, as determined by Dr. Buchanan, constitutes the total of the weighted ratios for each county.

Without addressing the validity of weighting in general, the court finds that the procedure is inappropriate in this case because of the notorious history of racially discriminatory recruiting practices on the part of the locals. See *Clark v. Chrysler Corp.*, 673 F.2d 921, 928 (7th Cir.), *cert. denied*, 103 S. Ct. 161 (1982). Moreover, there are extreme differences in the size of the nonwhite populations of each county and the number of members living in each county. The result is that, in many instances, a county with a high nonwhite population is accorded less weight than a county with a low nonwhite population. For example, as illustrated by Dr. Zellner, black males over the age of 25 constitute 21% of the population of New York county but only 3.5% of the population of Nassau. Yet, only 7% of the merged locals' apprentices live in New York county while 21% live in Nassau. This means that, under Dr. Buchanan's weighting approach, New York county's relatively high black population is given one-third the weight that is given to the relatively low black population of Nassau. This obviously is unacceptable.

For these and other reasons that will not be elaborated upon, the court finds that the methods employed by Dr. Buchanan are so clearly misdirected as to lead to the conclusion that they were used in a conscious effort to result in depressed findings. The court is not at all persuaded by his conclusions, which are arbitrary and lack any rational basis.

As to plaintiffs' stand on the goal, the court finds that Dr. Zellner's methods and analyses are more appropriate for this case. Yet her ultimate conclusion that the goal should be increased to somewhere between 33% and 41% is unacceptable. One of the reasons why Dr. Zellner has determined that the goal should be increased is her opinion that women should be included in the relevant labor pool. The court sees no reason why women should be excluded from the pool especially since the merged locals currently contain female members. The inclusion of women, however, does not justify the increases suggested by Dr. Zellner.

In her affidavit sworn to on June 3, 1983, Dr. Zellner has separated her conclusions based upon the 1970 census into the following age groups: 18-24, 18-29 and 18-34. Her findings

under the 1980 census have been made for the 16 years of age and older category. She has determined that the minority availability rate for the relevant labor pool is 32.53% in the 18-24 year age group (Table 5), 37.34% in the 18-29 year age group (Table 6) and 39.29% in the 18-34 year age group (Table 7), using the 1970 census. Under the 1980 census, Dr. Zellner has found that the minority availability rate is 40.70% in the 16 years of age and older category. The Appendix Tables of her affidavit, however, show different and lower results for the data based on the 1970 census. According to the Appendix Tables, the minority availability rate in the 18-24 year age group is 29.23% (Appendix Table 12), 33.73% in the 18-29 year age group (Appendix Table 15) and 35.65% in the 18-34 year age group (Appendix Table 18).

Dr. Zellner has not explained the disparities in the results of her Tables and those of her Appendix Tables. They are not justified by the use of the educational formula employed by the court when it set the goal at 29%, 401 F. Supp. 467, 489 n.27 & 493, because Dr. Zellner specifically states that she did not perform that procedure with respect to Tables 5-7 and 10. Affidavit of Harriet Zellner sworn to June 3, 1983 at pp. 20 & 21. In any event, since the Appendix Table contain population statistics, the court finds that they are more reliable and adopts the minority availability rates contained therein.

The Appendix Tables provide different rates depending upon the oldest age to be used for the relevant labor pool. The court therefore must determine the cutoff age for the pool. Since most of Local 28's journeymen began in the apprentice program, the rules of which require the apprentice to be between the ages of 18 to 25 upon admission, it seems that the most reasonable age group to be used is the 18-25 year group. Dr. Zellner, however, has given no breakdown for the 18-25 year age group, which is surprising in light of the apprentice program rules and in light of Dr. Buchanan's use of age 25 as the starting base. The court therefore must rely on the nearest estimate, which is the 18-24 year age group. As noted above, the minority availability rate for that category is 29.23%. Accordingly, that is the goal that the merged locals must attain.

The court is aware, as it was in 1975, that, in setting an employment affirmative action goal based upon statistical information, certain criteria that do not readily lend themselves to statistical quantification may not be given the proper weight. In this case, these amorphous concepts include overqualification, job preference and trends toward clerical rather than manual labor. Yet the court also is required to "do the best it can" to remedy prior discrimination. *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 632 (2d Cir. 1974). Here, the court has been given two completely conflicting sets of materials upon which to base its decision on the impact that the merger has had on the goal. Since the underlying analyses of plaintiffs' studies are more acceptable than those of defendants, the court has no choice but to adopt plaintiffs' findings.

The new goal of 29.23% essentially is the same as the goal set in 1975. Although defendants were given seven years to attain that goal, see Revised Affirmative Action Program and Order, entered on January 19, 1977, ¶2, they have not. Indeed, they have a long way to go. In addition, they consistently have violated numerous court orders that were designed to assist in the achievement of that goal. The court therefore sees no reason to be lenient with defendants, for whatever reason, and orders that the combined union and apprentice program membership of the merged locals must reach a nonwhite membership of 29.23% by August 31, 1987. If the goal is not attained by that date, defendants will face fines that will threaten their very existence.

SO ORDERED.

DATED: New York, New York
August 31, 1983

/s/ HENRY F. WERKER
.....
U. S. D. J.

NOTES

1. The term nonwhite includes Black and Spanish surnamed individuals. 401 F. Supp. 467, 470 n.1 (S.D.N.Y. 1975).

2. It is the court's opinion that the use of Standard Metropolitan Statistical Areas ("SMSAs") is the proper method of defining the geographical dimensions of the relevant labor pool. Dr. Buchanan's breakdown of population statistics by county contributes little to his analysis. While Dutchess, Sullivan and Ulster counties do not fall within the relevant SMSA, they contain less than 1% of the journeyman membership of the merged locals and 0% of the apprentices. Monmouth and Middlesex counties also are not included in the relevant SMSA, but they account only for approximately 4% of the journeymen and 2% of the apprentices. Only two journeymen and no apprentices live in Atlantic county, which again is outside the relevant SMSA, but also is relatively far removed from the relevant labor market.

3. Since there is no Appendix Table for the 1980 census, the court does not accept Dr. Zellner's conclusions with respect to that census.

ORDER
71 Civ. 2877 (HFW)

**United States District Court
Southern District of New York**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . , LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP
COMMITTEE . . . SHEET METAL AND AIR CONDITIONING
CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

Defendants.

HENRY F. WERKER, D. J.

Plaintiff the City of New York ("City") having moved before the Administrator by order to show cause dated April 11, 1983 for an order determining that defendants Local 28 and the Joint Apprenticeship Committee ("JAC") have violated various provisions of the Order and Judgment ("O&J") entered on August 28, 1975 and the Revised Affirmative Action Plan and Order ("RAAPO") entered on January 19, 1977, and

the Court having read the papers submitted by the parties to the Administrator in support of their respective contentions on the motion and the transcript of the hearing on the motion held before the Administrator on April 29, 1983, and

the Court having read the Administrator's Memorandum Decision dated May 18, 1983 in which he found that Local 28 and the JAC have violated the O&J and RAAPO, and

the Court having read the objections submitted by Local 28 and the JAC to the Administrator's Memorandum Decision dated May 18, 1983 and various other relevant documents, it is

ORDERED that the Administrator's finding, as contained in his Memorandum Decision dated May 18, 1983, that Local 28 and the JAC have violated the O&J and RAAPO is adopted by the Court, and Local 28 and the JAC hereby are held in civil contempt. The imposition of fines will await the Court's determination with respect to the issue of the establishment of an employment, training, education and recruitment fund, and it further is

ORDERED that the Administrator's recommendation, as set forth in his Memorandum Decision dated May 18, 1983, that a computerized record-keeping system be developed and maintained by an independent management firm and that Local 28 and the JAC be required to pay for the system is approved, and it further is

ORDERED that Local 28 and the JAC forthwith comply with that recommendation, and it further is

ORDERED that Local 28 and the JAC pay the City the costs and attorney's fees expended on bringing on the order to show cause before the Administrator, and it further is

ORDERED that the City submit to the Court, on notice to the Administrator, Local 28 and the JAC, a detailed schedule of the costs and attorney's fees expended on the order to show cause within twenty (20) days of the entry of this Order.

SO ORDERED.

Dated: New York, New York
August 21, 1983

...../s/ HENRY F. WERKER.....
U.S.D.J.

71 CIV. 2877 (HFW)
MEMORANDUM DECISION

**United States District Court
Southern District of New York**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

Local 638 . . . Local 28 of the Sheet Metal Workers'
International Association, Local 28 Joint Apprenticeship
Committee . . . Sheet Metal and Air-Conditioning Contractors
Association of New York City, Inc., etc.,

Defendants.

APPEARANCES: (See last page)

DAVID RAFF, ADMINISTRATOR

By Order to Show Cause dated April 11, 1983, plaintiff City of New York ("City") brought on a proceeding, pursuant to paragraph 15 of the Order and Judgment (O&J) and section 41(a) of the Revised Affirmative Action Program and Order ("RAAPO"), against defendant Local 28, defendant Joint Apprenticeship Committee ("JAC") and eleven named contractors for alleged violations of various provisions of the O&J and RAAPO.

The Administrator having read the City's Affidavit In Support dated April 11, 1983, Local 28's Affidavit in Opposition dated April 13, 1983, the JAC's and Contractor's Affidavit In Opposition dated April 14, 1983, and the City's Supplemental Affidavit dated April 25, 1983, and having conducted a hearing on April 29, 1983, at which all parties, except DNS, appeared and had the right to submit further evidence, and having reviewed the record, it is my conclusion that defendant Local 28 and defendant JAC have violated the O&J and RAAPO.¹

VIOLATIONS BY LOCAL 28

At the time of the hearing, the parties broke the alleged violations regarding Local 28 into three categories. I will address each in turn.

1. Failure By Local 28 to Provide Required Records In a Timely Fashion

Local 28 is required to maintain and submit various records which set forth its membership population by, among other

¹ At the hearing, the City withdrew all allegations of violation against the eleven named contractors. In addition, the City withdrew its allegation against the JAC that it failed to submit proper manpower summary reports with all employer data listed. Subsequent to the hearing, and subsequent to an agreement by all parties on the merger issue, the City withdrew its allegation that Local 28 violated O&J ¶ 21(j) by admitting persons to membership in Local 28 by means other than those provided for by RAAPO. See Stipulation of Withdrawal attached hereto as Appendix A.

things, racial and ethnic identification. (See RAAPO §33(k) and O&J ¶¶ 21 (e)(xii) (record of "whites and non-whites who are employed as sheet metal workers by Local 28 contractors . . . shall be submitted to counsel for the parties herein and the Administrator at least once every three months"), 21(i) ("at least once a year . . . Local 28 . . . shall submit to the Administrator and the parties herein, a list of *all* members and apprentices of Local 28, with race identification, broken down into the following categories (i) active members; (ii) Pensioners; (iii) apprentices") (emphasis added)). In addition, Local 28 is required to maintain and submit various records which contain information about people entering Local 28 as journeymen or apprentices. With particular relevance is RAAPO § 33(f), which requires Local 28 to submit information regarding "Persons who seek or apply to transfer into Local 28 from an affiliated sister local union . . . at least once every three months", and RAAPO § 34(a) which requires Local 28 to submit "the names and ethnic identities of persons admitted into (i) journeyman status in Local 28 . . . within 5 days of such admission". (See also RAAPO § 34(b) which requires a semi-annual *total membership* census report.)

Effective November 1, 1981, Locals 10, 13, 22,² and 559³ were merged into Local 28 by a merger order, dated October 16, 1981, from the International's President, Edward J. Carlough. On March 23, 1982, a similar merger order was imposed upon Local 55. As a result of those mergers, the former Locals' members were fully integrated into Local 28 and were afforded the full rights and privileges of Local 28 members. (Plaintiffs' Ex. 3 and 4.) Such rights included the right to work anywhere in the expanded geographical area without the need of a work permit from Local 28.

² Local 22 has, by virtue of an election conducted by the National Labor Relations Board, become an independent union, and is no longer affiliated with either Sheet Metal Workers' International Association or Local 28.

³ Local 559 is a one shop local comprised solely of production workers who perform no work in the construction industry.

Local 28 made no independent effort to inform the parties, the Administrator or the court of the merger orders, despite the fact that such a merger would clearly have an impact upon numerous provisions of the O&J and RAAPO. Moreover, between October 16, 1981 and April 7, 1982 (when Local 28 finally responded to a March 24, 1982 inquiry about the merger from the City, and a follow-up March 30, 1982 letter from the Administrator), no information about the merger was provided. Since the individuals that were merged into Local 28 were given full Local 28 membership status, and were working for contractors who were now dealing with Local 28 as the successor contract administrator, the terms of the O&J and RAAPO applied with full force and effect. However, the data filed by the defendants which was required under the O&J and RAAPO did not contain any reference to the merged unions or note the new membership statistics during this period of time. (See RAAPO § 34(b).)

Subsequent to the mergers, the JACs of Locals 10, 13 and 55 continued to operate and graduated a number of apprentices into full Local 28 journeyman status.⁴ Nonetheless, the names and racial or ethnic identities were not provided to the parties or the Administrator, even after this court made it clear, at its May 25, 1982 conference (Tr. 10) and restated it at its June 10, 1982 hearing (Tr. 187-188), that the merged locals were to be considered part of Local 28.

In May and July 1982, Local 28 submitted, literally, volumes of data and statistics about the merged unions. Local 28 argues that this data contains all the information required by the O&J and RAAPO, and that later responses to the plaintiffs' discovery on the merger made up for any deficiencies that might have existed. Thus, it is contended, that there is no violation or, if a violation occurred, it was merely technical and defendant has, in effect, now purged itself of the violation. This data was not provided by Local 28 in order to meet its obligations under the O&J and RAAPO; rather, it was supplied in response to the City's

⁴ During this period, former Locals 13 and 55 also admitted into their membership persons working for a contractor whose work was found to be satisfactory by such contractor.

March 1982 inquiry about the merger, my follow-up letter, and my demand for the data as contained in my June 28, 1982 Memorandum and Order. Moreover, neither Local 28's December 7, 1982 membership census report nor its census report submitted on February 25, 1983, contained the data for the total membership.

Local 28 appears to be of the belief that, because the merger was a complex internal matter and because it did, eventually, supply the necessary data, and is now making efforts to complete the court authorized membership survey, no finding of violation should be made. (Tr. 40-49.) Such a position is without merit. Defendants' obligation is to comply with the court's orders in the manner prescribed, *and at the time mandated*. Anything less is non-compliance, and thus violates the O&J and RAAPO.

In *Maness v. Meyers*, 419 U.S. 449 (1975), the Supreme Court made it explicitly clear

[t]hat all orders and judgments of the courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect, the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt, even if the order is ultimately ruled incorrect.

Id at 458. See also this court's August 16, 1982 Contempt Decision ("Contempt Decision".) Slip Op. at 5, 29 FEP Cases 1143, 1145.

As a result of Local 28's failure to provide complete, accurate and timely data, I find that Local 28 violated paragraphs 21(e)(xii) of the Order and Judgment and sections 33(f)⁵, 33(k)

⁵ I reject defendant Local 28's argument that the merger was not a transfer from a sister local or that the terms of RAAPO do not apply to a mass transfer situation. The requirements are unequivocal; nonetheless, if Local 28 had doubts about its obligations or wished to be relieved from some part of the

and 34(a) and (b) of RAAPO, and that such record keeping violations are in addition to those previously found by this court in its Contempt Decision. Slip Op. at 7-8, 29 FEP Cases at 1146.

2. Local 28's Failure to Provide Accurate Data

There can be no doubt that the foundation of the reporting obligation is the submission of *accurate* data. Data that is not independently verifiable or which is inaccurate undermines the intent of the reporting provisions and cannot be countenanced under any circumstances. It follows, therefore, that defendants must insure, to the greatest degree possible, that the data submitted to the parties are true and correct.

Local 28's census report, dated December 7, 1982, showed its non-white journeyman membership at 181; however, its February 25, 1983 census showed a non-white membership of 200. Despite the fact that the only admissions to journeyman status, in the intervening time, was the graduating apprentice class, which had only six non-whites in it, and a few individuals from recently organized shops, Local 28 offered no explanation of how the non-white membership gained 19 members in just ten weeks. After I inquired of Local 28 about this (Plaintiffs' Ex. 15), I received a listing of the additional non-whites in a letter dated March 7, 1983 (Plaintiffs' Ex. 16). Of particular interest was the inclusion of one Arnold Kaplan, a member of Local 28 since 1957, who portrayed himself as Spanish surnamed in response to the membership survey sent to all members (Def. Ex. 1). Based upon Mr. Kaplan's submission, Local 28 moved him from white to non-white. After inquiry from the Administrator, Local 28 followed up and ascertained that Mr. Kaplan was, in fact, white. (Def. Ex. 2, Tr. 52-55).

Footnote continued from previous page

orders, it was certainly free to apply for a modification or clarification of the orders. See RAAFO § 45, O&J ¶ 27. Local 28 was not free, however, to disregard the order. See, *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (a defendant acts at its own peril in taking steps without asking the court to clarify any perceived ambiguities in its order); *Maness v. Meyers*, *supra*.

It is evident on its face that Arnold Kaplan is not a Spanish surname; and his response to the membership survey should have caused alarm bells to ring long before his name was submitted to the parties and Administrator as non-white. (See Tr. 75.) I find that Local 28's submission of Arnold Kaplan as a non-white was either the result of gross negligence or wanton disregard of this court's orders. In either event, a finding of violation is warranted.

Local 28's inability to provide accurate data is further shown both by its reporting of Jose Marquez as a white, until Local 28's clarification letter of March 7, 1983 (Plaintiffs' Ex. 16), and the testimony of Daniel Wilton, defendant Local 28's Treasurer. From at least 1976 through the end of 1982, there was no formal system to verify the racial and ethnic composition of Local 28's membership. Such verification that was done, was done on a totally haphazard basis. (Tr. 63, 67-69, 72-76.) It is inconceivable that the officers of Local 28 did not understand the importance of accurate record keeping and that all submissions to the parties, the Administrator, and the court had to be as correct as possible.

In light of defendants' record keeping problems, as found by the court in its Contempt Decision, and the explicit record keeping requirements contained in the O&J, AAP and RAAPO, I reject any argument that the most recent problems were simply the result of human error. The lack of any proper verification controls confirms my opinion that Local 28 has not acted in the affirmative manner contemplated by the court. I therefore conclude that Local 28 has, by its submission of inaccurate data, violated both the letter and the spirit of the court's record keeping and reporting obligations. See O&J ¶¶ 21(e)(xii) and 21(i); and RAAPO § 2, 33(k) and 34(b).

3. Local 28's Failure to Serve the O&J and RAAPO on Local 28 Contractors

By Memorandum and Order dated July 30, 1979 and later amended on March 12, 1980, I ordered, *inter alia*, that plaintiffs serve the O&J and RAAPO upon all employers in contractual agreement with Local 28. The purpose was to be certain that the individual contractors were aware of the terms of the court's orders, and to be able to hold any contractor directly accountable

for any conduct which proved to impede or impair the effectuation of those orders. To insure that any new contractors were also aware of their obligations, I directed Local 28 to send to such employers "copies of both the Order and Judgment and RAAP&O, certified, return receipt requested. Copies of the certification cards are to be provided to the parties upon their receipt by Local 28." (Plaintiffs' Ex. 2, Raff letter of November 20, 1981). No certification cards were provided to the parties, and no proof of service was provided in response to the City's letters of January 6, 1983 (Plaintiffs' Ex. 19) and March 22, 1983 (Plaintiffs' Ex. 17).

At the time of the hearing on this matter, counsel for Local 28 attempted to testify as to Local 28's practice and procedure in providing the O&J and RAAP&O to contractors. (Tr. 76-78.) This attempt was clearly improper. See Disciplinary Rules of the American Bar Association's Code of Professional Responsibility, D.R. 5-102(A). Had such attempt been pursued, it would have been appropriate to disqualify Local 28's counsel from continuing to represent it. See, e.g., *United States ex rel Sheldon Electric Co. v. Blackhawk Heating & Plumbing, Inc.*, 423 F. Supp. 486, 489 (S.D.N.Y. 1976); *General Mills Supply Co. v. SCA Services, Inc.*, 505 F. Supp. 1093, 1098 (E.D. Mich. 1981).

Thereafter, counsel requested an adjournment to bring in the Recording Secretary to testify as to Local 28's procedures. Counsel was well aware that a formal proceeding on the violations was to be held and had ample opportunity to produce any necessary witnesses. Consequently, the request was denied. Finally, I noted that even if the witness had been produced, I would have precluded any testimony of such witness.

By letter dated January 6, 1983, the City requested "a list of all contractors Local 28 has served copies of the O&J and the RAAP&O upon and proof, if any, of such service". (Plaintiff Ex. 19.) On February 28, 1983, counsel for Local 28 responded by saying that he had not been able to secure proof of service. (Plaintiffs' Ex. 20.) On March 22, 1983, the City requested information regarding service in the form of an affidavit "from the Local 28 official responsible for service of the O&J and RAAP&O". (Plaintiffs' Ex. 17.) No such affidavit was provided.

Furthermore, Local 28's Affidavit in Opposition to the Violation Order to Show Cause is merely an attorney's affidavit; and it makes no mention of the specific person(s) who allegedly served the O&J and RAAP&O. The Second Circuit has noted that the Federal Rules of Civil Procedure transformed "the sporting trial-by-surprise into a more reasoned search for truth." *Cine Forty-Second Street Theater v. Allied Artists*, 602 F.2d 1062, 1063 (2d Cir. 1979); See also, *In Re Professional Hockey Antitrust Litigation* 63 F.R.D. 644, 656 (E.D. Pa. 1974), *aff'd* 427 U.S. 639 (1976) ("Courts today do not condone the 'surprise' approach to discovery whereby at the latest possible moment the parties reveal the substance of their cases"). Certainly, to have allowed Local 28 an adjournment or to have allowed testimony from a witness whose alleged personal knowledge was not revealed until the actual moment of inquiry at trial would be to condone the "trial-by-surprise" tactic condemned by the courts.

Local 28 also argues that the City had the burden of making its case and that the transcript of Robert Sinkler's testimony (Plaintiffs' Ex. 18) does not show that he was not served with the O&J and RAAP&O. This argument has no merit. Sinkler, responding to an Order to Show Cause (which was sent to all parties), testified that he had not received the O&J and RAAP&O from an official of Local 28 (Sinkler Tr. 4-6.) Finally, Local 28 argues that it was denied due process because it could not cross examine Robert Sinkler. Local 28 was not deprived of that right. Local 28 had an opportunity to appear at the hearing involving County Sheet Metal, Inc. and examine any witnesses. It did not so appear. Moreover, the relevant portion of the Sinkler transcript was contained in the City's exhibits. Consequently, Local 28 was on notice that the City intended to use Sinkler's testimony. If Local 28 wanted to challenge Sinkler's testimony, it had the obligation to introduce contrary evidence.

Local 28 has provided no evidence that it obeyed my November 20, 1981 directive as to either the actual service required or, separately, the required proof of service. Thus a finding of violation on both counts is warranted.

VIOLATIONS BY THE JAC

The City alleged that the JAC violated sections 20(c)(iv)(A) and 35(c) of RAAPO by failing to provide the parties and the Administrator with records that contain accurate reporting of manhours worked by apprentices. *See also* RAAPO §20(c)(ii). A failure to provide accurate manhour records prevents the plaintiffs and the Administrator from independently assuring "that all members and apprentices of Local 28 share equitably in all available employment opportunities in the industry." (RAAPO § 1. *See also* O&J ¶ 21(g).) The JAC does not deny that its monthly manpower reports are not accurate reflections of actual time worked. It argues, however, that the parties and the Administrator have been aware, since at least 1977, that the manhour reports come from the employer records submitted to the welfare funds, and that the JAC must rely upon those reports since there is no report to the JAC directly. (Tr. 15.)

The JAC also argues that even if the records are not completely accurate, the fact that an apprentice may have missed a day of work or comes in late does not really affect anything of substance. (Tr. 17.) Like the discussion about Local 28's records, *supra*, the JAC interprets the requirements of RAAPO at its peril. *See McComb v. Jacksonville Paper Co.*, *supra*, at n.5. The parties are not free to impose their views of what is required over clear and unambiguous language. RAAPO requires that apprentice manhours be reported and it requires the JAC to provide those reports. To suggest that anything less than a reporting of accurate manhours is acceptable is to render meaningless the court's order in this regard.

The JAC suggests that I have "a moral obligation to carry out the terms of RAAPO and meet its objectives" (Tr. 28), and that I have broad parameters of power in how RAAPO should be construed. (Tr. 29.) The logical extension of that argument is that the JAC should be found in substantial compliance by the method of reporting it has used and that, in effect, the parties and, indeed, the Administrator should be stopped from contending otherwise at this late date. I decline to accept the implicit invitation contained in that contention. I do have broad powers of interpretation, but that does not allow me to "modify

or change the substantive terms of . . . the Program." (O&J ¶ 18.) To permit any reporting which is less than that called for by RAAPO or to permit "estimate" or inaccurate reporting goes beyond the scope of my powers. *See Contempt Decision*, Slip Op. at 5, 29 FEP Cases at 1145.

The JAC further argues that the JAC should be held blameless because the employers do not report hours to the JAC (Tr. 15 and 23), and moreover, to require reporting of exact hours would be a "gross burden" upon the employers and have a "chilling effect upon the employers hiring apprentices when there is no reason for it." (Tr. 28.) I reject this argument out of hand. RAAPO §§ 20(c)(ii), 20(c)(iv)(A) and 35(c) state that it is the JAC which *shall* provide or furnish records which include manhours. If the JAC could not furnish accurate manhours, it had an obligation to seek relief from these provisions, not unilaterally decide that what it had been providing was sufficient. (*See* discussion of defendants' history of making unilateral decisions *infra* at 20.)

The "gross burden" upon employers to report accurate manhours does not exist. Employers hiring CETA apprentices have been reporting exact hours for over a year. (*See* Plaintiffs Ex. 9.) Nor do I find any support for the idea that employers may be "chilled" in hiring apprentices because they must report accurate hours. Local 28 members and apprentices are paid on an hourly basis. Thus, the employers' payroll records must, necessarily, contain the required information. It takes no great effort to transcribe these records to a weekly reporting form.

Finally, the JAC argues that its conduct was not willful or done with intent to deprive the parties of information. The law on this point is clear. It is not necessary for a finding of violation that such violation be willful, *Farber v. Rizzo*, 363 F. Supp. 386 (E.D. Pa. 1973) or that there be intent to violate the court order. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); *Woolfolk v. Brown*, 358 F. Supp. 524 (E.D. Va. 1973); *United States v. Ross*, 243 F. Supp. 496 (S.D.N.Y. 1965). Indeed, the fact that the conduct was done inadvertently or in good faith does not, in and of itself, preclude a finding of violation. *Doe v.*

General Hospital, 434 F. 2d 427 (D.C. Cir. 1970); *Coca-Cola Co. v. Bisignano*, 343 F. Supp. 263 (S.D. Iowa 1972).

The facts leave me no alternative but to find that the JAC has violated RAAPO §§ 20(c)(ii), 20(c)(iv)(A) and 35(c).

DISCUSSION

The violations found herein cannot be viewed in isolation, rather they must be seen as part of a pattern of disregard for state and federal court orders and as a continuation of conduct which led the court to find defendants in contempt on August 16, 1982. This case is very much like a 1,000 piece jigsaw puzzle. No piece, by itself, provides any idea of what the entire picture looks like. But as the pieces begin to fall into place, the essential nature of each piece becomes more and more apparent, until, finally, a recognizable picture begins to emerge. The court orders contain a variety of little pieces which are essential for the plaintiffs, the Administrator and the court to understand how defendants are complying with or thwarting the court's mandate. Each piece has its importance. To dismiss any piece as inconsequential or as merely technical is to take away a necessary tool for monitoring a union and an industry that has been under one court order or another for nearly 20 years.

Defendants have been before either human rights agencies (New York State Commission on Human Rights and New York City Commission on Human Rights), the New York State Supreme Court or the federal court since January 2, 1963. After more than 20 years of litigation, Local 28's February 25, 1983 pre-merger census shows a non-white journeyman membership of only 10 per cent.

Throughout the history of the litigation, defendants have sought to portray themselves as innocents caught in a web of onerous and burdensome orders, economic conditions beyond their control, "nit picking" by plaintiffs, ineffective monitoring by plaintiffs and the Administrator, and undue and unproductive concern by plaintiffs and the Administrator with the details of the affirmative action programs rather than the true objectives of the court orders. Defendants cloak themselves in righteous indignation about the cost of the litigation and the intrusion of

the court into what they perceive as strictly internal affairs of the union and industry.

Glib of tongue and fleet of argument, defendants have, over the years, managed to raise what appear, on the surface, to be rational and responsible arguments why certain records cannot be kept, why mandatory time periods cannot be met, why new procedures are unworkable, why the record keeping requirements are "grossly" burdensome, why apprentices could not receive proper training if the numbers are increased, why employers cannot afford additional apprentices, why a general publicity campaign would not be productive, and why they should not be held liable for their lapses in conforming to the requirements of the court orders. However, beneath the surface of those arguments rests a pattern of delay, obstructionism and blatant disregard for court orders that goes back as far as 1965.

In *Commission of Human Rights v. Farrell*, 43 Misc. 2d 958, 252 N.Y.S. 2d 649, 57 LRRM 2005 (Sup. Ct., N.Y. Cty. 1964), Mr. Justice Markowitz praised the parties, including defendants, for their complete cooperation in working out a non-discriminatory apprenticeship training program. 57 LRRM at 2010-11. However, by 1965, Justice Markowitz' praise had turned to fury and he soundly castigated defendants for taking unilateral action to delay apprenticeship indenture and limit the size of a previously agreed upon apprentice class. Indeed, recent conduct of the defendants, regarding their failure to inform the court about the merger, is an echo of their 1965 conduct when they did not advise the court of their failure to indenture the agreed upon apprentice class. In his 1965 decision, Mr. Justice Markowitz noted that "it was incumbent upon the parties to expeditiously bring this matter to the court's attention." 59 LRRM 3050, 3051. See also, Mr. Justice Markowitz' opinion on defendants' motion for reconsideration. 60 LRRM 2178, 2179, *aff'd* 60 LRRM 2509 (First Dept., App. Div. 1965).

It cannot be stated too strongly that the burden is not upon plaintiffs or the Administrator, but is upon defendants to act in a forthright and affirmative manner to comply with the letter and spirit of the court orders. If defendants object to certain requirements, they may apply to the court for relief. However, a

unilateral decision that various provisions cannot or will not be met will continue to lead to findings of violation.

One of the patterns that has emerged upon review of the aforementioned state court decisions, defendants' papers filed in the federal court action, defendants' response to the contempt motion, defendants' motion to be relieved of the court orders, and, finally, the colloquy which took place before me on April 29, 1983, *leads to the inescapable conclusion that there is an inherent conflict of interest among the defendants which is exacerbated by the roles of counsel.* This has, in my opinion, been a contributing factor to the slow pace of this case.

The union has indicated in no uncertain terms that its obligation is to protect the economic interests of its members over the interests of apprentice applicants. 59 LRRM at 3051, 60 LRRM at 2179. *See also* Defendants' Memorandum In Opposition to Plaintiffs' Motion For Contempt, etc. at 32-39, 72-79; Defendants' Reply Memorandum at 22. The JAC's obligation is to provide adequate training to achieve journeyman status and to serve as a workforce feeder into the industry, thereby insuring a sufficiently trained group of people to meet the employers' needs. The two concepts come in conflict when there are difficult economic times for the industry and full union members, who elect union officials, are in danger of being laid off while at the same time the pressure, exerted by the court order, is to keep the apprentice numbers up. The defendants' reaction in 1965 and again between 1976 and 1982 was to protect the members' interests by keeping the apprentice numbers low. In 1982, this conduct led to the court's finding that defendants had underutilized the apprenticeship program. Contempt Decision, Slip Op. at 2-3, 29 FEP Cases at 1144-45.

Counsel for the union is also co-counsel for the JAC. Thus, the question of divided loyalty.⁶ The JAC, a separate legal entity from the union, recruits, selects, indentures and trains apprentices. The court orders require that the JAC indenture as

⁶ An indicia of this problem was counsel's attempt to testify, thereby assuming the role of a principal in speaking about the union's practices. *See* discussion, *supra*, at 11.

many apprentices as can be properly trained and engage in other conduct that may not coincide with the interests of the union members, as the Executive Board of Local 28 sees the matter. The record of this case both in 1965 and the present clearly shows that the union's interests become dominant and the JAC acts in response to those pressures. Thus, the question of how counsel can properly represent both interests.

This conflict is also evident with regard to the counsel for the Contractor's Association, since he happens to be its Executive Director and co-counsel for the JAC. Sections 20(c)(ii), 20(c)(iv)(A) and (B), and 35(c) of RAAPO are mandatory. The JAC, if it could not comply with RAAPO because of the failure of employers to provide the necessary data, was required to act affirmatively to obtain that data, including, if necessary, bringing an action against the recalcitrant employers. Its failure to do so left it open to the violations found herein. However, under the circumstances, it is unlikely that co-counsel for the JAC would take action against a member employer of the Contractor's Association or, in effect, against himself.

The transcript of the April 29, 1983 hearing certainly points to the conflict. Counsel attempted to intermingle the interests of the JAC and the employer; and, to a large extent, the interests do overlap. But, the interests diverge when counsel talks about the required record keeping as a "gross burden" upon the employers. Such argument best serves the employers' interests and does not, in my opinion, serve the JAC's interest which is to obey the mandate imposed upon it by the court.

As long as defendants maintain a situation where counsel have conflicting loyalty, it is the client who will suffer the consequence.

CONCLUSION

The arguments made by defendants in response to the City's motion are similar to those made before the court during the June 10, 1982 Contempt proceeding. The court summarily rejected those arguments. *See* Contempt Decision, Slip Op. at 7-8, 29 FEP Cases at 1146. Moreover, the court made it clear that defendants are to obey its orders and "it is not for the

defendants to evaluate the wisdom of aspects of the court's orders". *Id* at 5, 29 FEP Cases at 1145. Notwithstanding this admonition, and the imposition of a substantial fine, defendants continue to follow the path of passive, if not overt, resistance. This conduct was made manifest by the failure to file required data, the filing of inaccurate data, the failure to provide for a proper record keeping system, and the continuing representation that plaintiffs, the court and I have lost sight of the true objectives of the O&J and RAAPO, even after the court found defendants in Contempt.

Based upon the foregoing, I find that defendants have violated the O&J and RAAPO and recommend that the court hold defendants in civil contempt.

REMEDY

Plaintiff City of New York requests two forms of relief. First, that a computerized record keeping system be developed and maintained by an independent management firm; and second, that defendants be required to pay for such a system. The City also requests it be awarded attorney's fees and costs.

As a result of the merger, Local 28 has 3,295 journeymen members and 530 apprentices.⁷ There are now in excess of 225 individual contractors employing Local 28 members or apprentices, four separate Joint Apprenticeship Committees, three separate Contractor's Associations, and the geographical jurisdiction covers all of New York City, Nassau and Suffolk Counties, New York; and Essex, Passaic, Hudson and Bergen Counties, New Jersey. Thus, the record keeping and monitoring problem has expanded enormously.

Defendants represent that they are moving toward a computerized record keeping system and that they will be able to provide any data requested by plaintiffs. The problem with that approach is that the data out is only as good as the data in, and the raw data would remain under the direction and control of

⁷ The non-white membership of both journeymen and apprentices was 11 percent of the total membership as of November, 1982.

defendants, who have been found in contempt of court for record keeping violations, and who are, once again, being found in violation. The fact is that defendants' data has been insufficient, incomplete, untimely and inaccurate. The plaintiffs cannot adequately insure compliance with the court's order under these conditions, and are entitled to a record keeping system which is both accurate and is subject to independent verification. Moreover, plaintiffs should not, with the history now before us, have to continually bear the burden of monitoring the record keeping.

As a result, I endorse the City's proposed remedy and recommend that the court accept it.

I further recommend that additional fines be imposed upon defendants. My recommendation as to the nature and the amount of such fines will be made as part of the report to the court on the issue of the imposition of fines to coerce future compliance. *See* Contempt Decision, Slip Op. at 11, 29 FEP Cases at 1147. ("In view of the defendants' past recalcitrance, I am of the opinion that it is also necessary for the court to impose a fine to coerce future compliance. . . However, the imposition of the coercive fine must await the submission of a report by the Administrator. . .").

Finally, I recommend that the City be awarded attorney's fees and costs.

Respectfully Submitted,

Dated: New York, New York
May 18, 1983

David Raff
Administrator

⁸ Precedent for the record keeping system requested by the City can be found in paragraph 12 of the 1970 Consent Decree in *U.S. v. Wood, Wire and Metal Lathers, Local 46*, (unreported) Contempt Dec. at 328 F. Supp. 429 (S.D.N.Y. 1971).

APPEARANCES

Attorney for the plaintiff City of New York
 Corporation Counsel
 100 Church Street
 New York, New York 10007
 By: Charles R. Foy, Esq.

Attorney for the plaintiff EEOC
 90 Church Street
 New York, New York 10007
 By: Ricardo Cuevas, Esq.

Attorney for the defendant Local 28
 Edmund D'Elia, Esq.
 919 Third Avenue
 New York, New York 10022

Attorney for the defendants JAC and Employers' Association
 William Rothberg, Esq.
 16 Court Street
 Brooklyn, New York 11241

STIPULATION OF SETTLEMENT AND WITHDRAWAL
71 CIV. 2877 (HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
 THE CITY OF NEW YORK,

Plaintiffs,

-against-

LOCAL 638 . . .
 LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL
 ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . .
 SHEET METAL AND AIR-CONDITIONING CONTRACTORS'
 ASSOCIATION OF NEW YORK CITY, INC., ETC.,

Defendants.

WHEREAS, paragraph 21(j) of the Order and Judgment ("OJ") entered in the instant action on September 7, 1975, provides that "except as modified, changed or amended by the terms of this Order, (the RAAPO) or order of the Administrator, Local 28 and JAC shall not change, modify or amend any aspect of the operation or content of the Apprentice Program, or the conditions or terms upon which an individual shall become a member of the Apprentice Program or Local 28 or entitled to work within the jurisdiction of Local 28," and

WHEREAS, Edward Carlough President of the Sheet Metal Workers' International Association ("International") issued orders dated October 16, 1981, and March 23, 1982, ("merger

orders") requiring former Locals 10, 13, 55 and 559 to merge into Local 28; and,

WHEREAS, the City of New York ("City"), by an Order to Show Cause, dated April 11, 1983, brought a motion alleging, *inter alia*, that Local 28 violated paragraph 21(j) of the OJ and it granted membership in Local 28 to graduates of the former locals Joint Apprenticeship Committees ("JACs"), and permitted members of the former locals to work within Local 28's jurisdiction; and

WHEREAS, a Stipulation ("Stipulation") is to be executed wherein JAC Essex/Passaic Counties, New Jersey, JAC Hudson/Bergen Counties, New Jersey, JAC Nassau/Suffolk Counties, New York, SMACNA of Long Island and Local 28 shall thereby be bound by the OJ and the RAAPO; and further the Sheet Metal Contractors' Association of Northern New Jersey shall set forth in writing its consent not to appeal upon the approval of the Court of the Stipulation.

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned that subject to the execution and entry of the Stipulation, the City shall withdraw with prejudice that portion of its motion dated April 11, 1983, which alleged that Local 28 violated paragraph 21(j) of the OJ. The E.E.O.C. and the Attorney General of the State of New York concurs and agrees not to bring a motion on the same facts. Nothing contained in this Stipulation of Settlement and Withdrawal shall be deemed to

be an endorsement of the merits of the legal claims of any party hereto, or an admission of liability by any party.

DATED: New York, New York
May 17, 1983

LOCAL 28 SHEET METAL
WORKERS' INTERNATIONAL
ASSOCIATION

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel
Attorney for Plaintiff
City of New York
100 Church Street
Room 6 D 8
New York, New York 10017

By: /s/ JOSEPH P. CASEY By: /s/ CHARLES R. FOY
CHARLES R. FOY

ROBERT ABRAMS
Attorney General
2 World Trade Center
Room 45-08
New York, New York 10047

By: /s/ SHEILA ABDUS-SALAM

SPENCER H. LEWIS
Acting Regional Attorney
 E.E.O.C.
 90 Church Street
 New York, New York 10007

By: /s/.....

SO ORDERED

/s/..... DAVID RAFF

Administrator
 DAVID RAFF

MEMORANDUM DECISION
 71 CIV. 2877 (HFW)
 DATED: 8/16/82
 #925

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
 THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
 INTERNATIONAL ASSOCIATION, INC. and LOCAL 28 JOINT
 APPRENTICESHIP COMMITTEE, *et al.*,

Defendants.

APPEARANCES: (See last page).

HENRY F. WERKER, D.J.

Plaintiffs, the City of New York (the "City") and the New York State Division of Human Rights (the "State") jointly move for an order holding the defendants, Local Union No. 28 of the Sheet Metal Workers' International Association ("Local 28"), Local 28 Joint Apprenticeship Committee ("JAC"), the Sheet Metal and Air Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association") in contempt of court for failing to comply with the Order and Judgment (the "O&J") entered on August 28, 1975 and the Revised Affirmative Action Program and Order (the "RAAPO") entered on January 19, 1977. Plaintiffs have named as respondents in this action one hundred and twenty-one private sheet metal contractors who have dealings with Local 28 (the "Contractors").¹ The defendants have cross-moved for an order terminating the O&J. The history of this litigation, except to the extent necessary, need not be repeated here. See *Equal Employment Opportunity Comm'n. v. Local 638*, 565 F. 2d 31 (2d Cir. 1977); *Equal Employment Opportunity Comm'n. v. Local 638*, 401 F. Supp. 467 (S.D.N.Y. 1975) and *Equal Employment Opportunity Comm'n. v. Local 638*, 421 F. Supp. 603 (1975) (the first AAPO), *aff'd as modified*, 532 F. 2d 821 (2d Cir. 1976).

In support of their motion seeking to have the defendants held in civil contempt, plaintiffs introduced at a hearing before the court on June 10, 1982 "clear and convincing evidence" that the defendants have not been "reasonably diligent and energetic in attempting to accomplish what was ordered" by this court. *Powell v. Ward*, 643 F. 2d 924, 931 (2d Cir.), *cert. denied*,

U.S. , 102 S. Ct. 131 (1981) quoting *NLRB v. Local 282, International Brotherhood of Teamsters*, 428 F. 2d 994, 1001-02 (2d Cir. 1970) and *Aspira of New York, Inc. v. Board of Education*, 423 F.Supp. 647, 654 (S.D.N.Y. 1976). Specifically, as discussed seriatim below, I find that six separate actions or omissions on the part of the defendants have impeded the entry of non-whites² into Local 28 in contravention of the prior orders of this court.

Plaintiffs presented evidence at the hearing demonstrating that since 1976 the defendants have adopted a policy of underutilizing the apprenticeship program³ administered by the JAC, thereby retarding the entry of non-whites into Local 28. The size of the apprenticeship program is of particular significance since historically a vast majority of Local 28 members gained admission to the union through graduation from the apprenticeship program. *Equal Employment Opportunity Comm'n v. Local 638*, *supra*, 401 F. Supp. at 474.

In the years 1977-1981, while the unemployment rate for apprentices was respectively 6.7%, 4%, 3.6%, .059% and 0%, Local 28 indentured a total of 334 apprentices. Pl. Exs. 8, 11 and 19; Def. Mem. in Opp. at 22. By comparison, in the years 1971-1975, when the unemployment rates for apprentices were respectively 3%, 6%, 7%, 20% and 40%, Local 28 indentured 2,174 apprentices. *Id.* Concomitantly, throughout the same period that the size of the apprenticeship classes was reduced, the average number of hours worked per year and the average number of weeks of employment per year for each journeyman was significantly increased. Def. Mem. in Opp. at 18 and 38. Of course, the journeymen benefiting from this policy of underutilizing the apprenticeship program comprise Local 28's white incumbent membership. Indeed, as of April, 1982, 6% of Local 28's journeymen membership was non-white. Pl. Ex. 45.

Not only has the apprenticeship program been underutilized since 1976, but the number of non-whites in the apprenticeship program could hardly have been enhanced by the defendants' refusal, in the face of the court orders, to implement a general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28. The O&J ¶ 21(h) in part provides:

In order to dispel Local 28's and JAC's reputations for discrimination in non-white communities, Local 28 and JAC shall implement, under the supervision of the Administrator, a program of advertising and publicity, through the use, inter alia, of non-white media including newspapers and radio stations directed primarily

toward non-white communities, designed to inform the non-white community in New York City of the non-discriminatory opportunities to join Local 28 and the Apprentice Program. Such a program shall include, but not be limited to, provisions to inform the non-white communities of the specifications and qualifications for the hands-on journeyman's test and the apprentice entrance tests, *and generally of opportunities available on a non-discriminatory basis in Local 28 and the Apprentice Program.* (Emphasis added.)

Moreover, the RAAPO also clearly provided for a general publicity campaign in addition to the advertising of the specific journeyman and apprentice entrance tests:

By April 1977, Local 28 and JAC shall provide to the Administrator and the other parties a written plan of an effective general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Apprentice Program . . ."

RAAPO ¶ 39. Thus, the general publicity campaign was intended to supplement the specific advertising for each "hands-on" journeyman's test and apprentice entrance test in order to dispel the defendants' reputation for discriminatory practices. There is absolutely no evidence before this court that the defendants undertook a general publicity campaign of the nature expressly contemplated by the RAAPO and O&J, much less that they submitted a written plan to the Administrator detailing such a campaign. See Tr. at 81-119, Def. Exh. 2A-2D, 2F-2H. Defendants attempt to justify their failure to undertake a general publicity campaign by arguing that a "campaign which was not tied to a particular event would lack . . . force." Def. Mem. in Opp. at 55. However, it is not for the defendants to evaluate the wisdom of aspects of the court's orders. Def. Ex. 1-A. Incidentally, defendants' contention that the "Administrator placed the burden of pursuing the issue of publicity compliance

on plaintiffs" is frivolous. Defendants' Proposed Findings of Fact and Conclusions of Law at 25 [hereinafter cited as Def. PFF&CL]. The Administrator is powerless to either modify an order of the court or to relieve the defendants from compliance with its terms.

Perhaps the two most clear-cut violations by the defendants of the orders of this court are (1) the failure by Local 28 and the JAC to maintain and submit to the parties and the Administrator lists and records as required by the O&J, the RAAPO and orders of the Administrator and (2) Local 28's issuance of work permits to members of sister locals without prior authorization of the Administrator. With respect to the issuance of the work permits, the O&J provided in part:

Defendant Local 28 is permanently enjoined from denying, withholding, discouraging, obstructing or otherwise interfering with direct access by non-whites to membership in Local 28 by relying on, using a system of, or issuing "identification slips" or "permits" to white members and/or apprentices of affiliated sister local unions or allied construction unions.

. . .

Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and only on such terms and conditions as the Administrator, in his discretion, shall require . . .

O&J ¶¶ 6, 22(f). In addition, the RAAPO provides in part:

Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and pursuant to Paragraph 22(f) of the Order and Judgment.

The procription of permits, without prior approval by the Administrator, was necessitated by this court's finding in 1975 that Local 28 had utilized the issuance of permits to purposefully discriminate against non-whites. *Equal Employment*

Opportunity Comm'n v. Local 638, *supra*, 401 F. Supp. at 486. Nonetheless, between March and June, 1981 Local 28 issued 13 permits without prior written authorization of the Administrator. Tr. at 178 and 182. Only one of these thirteen unauthorized permits was issued to a non-white. Pl. Exh. 14 at ¶ 9.

The thirteen unauthorized permits were issued by the Recording Secretary for Local 28, Joseph Casey. Mr. Casey's self-serving testimony that he did not intentionally violate the order of the court is of no moment to the issue of civil contempt here. Tr. at 182. While Mr. Casey's actions may not have been purposely designed to contravene the court orders, they certainly were not "reasonably diligent and energetic in attempting to accomplish what was ordered." *Aspira of New York, Inc. v. Board of Education*, 423 F.Supp. 647, 654 (S.D.N.Y. 1976).

With regard to the record keeping and reporting provisions of the RAAPO and the O&J, compliance with these requirements is absolutely vital to the effective monitoring and implementation of the RAAPO by the Administrator, the parties and the court. Nevertheless, the record is clear that the defendants have failed to maintain and supply vital information as required by the RAAPO ¶¶ 19(b), 20(c)(iv), 21(a), 33(a)-(p) and 34(b), the O&J ¶ 21, and a number of the orders of the Administrator. For example,⁴ the defendants failed to submit to counsel for the parties herein and the Administrator the quarterly records and lists containing separate data for the white and non-white membership of Local 28 as required by the O&J ¶ 21(e) and RAAPO ¶¶ 33(a)-(p). Defendants do not deny this failure. Instead, defendants argue that their failure may be excused for two reasons; first, because they submitted some "voluminous" reports to the parties and the Administrator, and second, because the plaintiffs failed to register complaints with the Administrator concerning the defendants' non-compliance. Def. PFF&CL at 27-28. These arguments are specious and merit little discussion.

Compliance with the quarterly reporting requirements is not satisfied by anything less than four complete reports each year. The defendants' contention that two reports in 1979, two reports in 1980 and no reports in 1981 is sufficient does nothing more than evince their blatant disregard for their obligation to provide

the appropriate parties to this suit with information pertinent to the enforcement of the O&J and RAAPO. *See* Pl. Exs. 28, 34-37; Def. PFF&CL at 27-29. Furthermore, ¶ 41(b) of the RAAPO merely provides for a mechanism whereby the parties "may make" complaints to the Administrator, it does not negate or override the other terms of the RAAPO. To be sure, the mere fact that plaintiffs did not register a complaint under ¶ 41(b) cannot be utilized by defendants to relieve themselves from compliance with the other terms of the RAAPO and O&J.

On June 29, 1981, Local 28 and the Contractors' Association entered into a Memorandum of Agreement which set forth certain amendments to their Collective Bargaining Agreement. In particular, the Memorandum of Agreement added to Article V of the Collective Bargaining the following provision:

During periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field.

Pl. Ex. 10. This amendment is not only age discriminatory on its face, but more relevant here, discriminates against non-white members of Local 28. The unrefuted expert testimony of Dr. Harriet Zellner clearly established the disparate impact that this provision would have on non-white members of Local 28. Tr. at 24-70. By entering into this provision of the Collective Bargaining Agreement, Local 28, the Contractors' Association and the respondents (who had been served with the O&J and the RAAPO) contravened the O&J ¶¶ 1, 7 and 21(g) which enjoined them from engaging in any act which has the purpose or effect of discriminating on the basis of race, color or national origin.

Based on the foregoing violations of the orders of the court and the Administrator, I have no other recourse but to hold the defendants in civil contempt of court. I note that while I am *not* holding the defendants in contempt for their failure to attain the 29% goal, and without placing primary emphasis on any one of the violations of the RAAPO and O&J discussed above, I am convinced that the collective effect of these violations has been to thwart the achievement of the 29% goal of non-white

membership in Local 28 established by the court in 1975. In reaching this conclusion, the court has not overlooked the obstacles or problems with which the defendants have had to contend. In particular, I have given much consideration to the economic condition of the sheet metal trade in particular and the construction industry in general over the past six years.

Defendants have failed to comply with the RAAPO in the manner discussed above almost from its date of entry. (For example, the defendants failed to provide the Administrator with a "written plan of an effective general publicity campaign" by April 1977 as required by the RAAPO ¶ 39). In order to remedy the past noncompliance of the defendants, I hereby direct that the defendants pay a fine of \$150,000. The fine is to be paid within 30 days from entry of this order. Before deciding upon the magnitude of this fine, I considered the "consequent seriousness of the burden" to the defendants. *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947). The proceeds from this fine will be placed in a fund (the "Fund") to be administered by the court (through the Administrator) for the purpose of developing the apprenticeship program of Local 28, with an eye toward increasing the non-white membership of the program and the union. The Administrator is directed to submit a report to the court as soon as practicable, after inviting comment from the parties, as to an effective program for utilizing the Fund.

After considering "the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired", *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 646 F. 2d 800, 810 (2d Cir. 1981), and in view of the defendants' past recalcitrance, I am of the opinion that it is also necessary for the court to impose a fine to coerce future compliance with the orders of the court and the Administrator. However, the imposition of the coercive fine must await the submission of a report by the Administrator, as discussed below, concerning any necessary modification of the RAAPO.

The plaintiffs' motion for expenses and reasonable attorneys' fees is granted. In view of the defendants' willful disobedience of the RAAPO and O&J, I believe an award is justified. *See*

Fleischmann Corp. v. Maier Brewing, 386 U.S. 714, 718 (1967). *See also* 42 U.S.C. § 2000-e 5(k). Plaintiffs' should submit on notice appropriate affidavits in support of their expenses and reasonable attorneys' fees.

The defendants' cross-motion for an order terminating the RAAPO is denied. The purposes of the RAAPO have not been achieved and it has not caused the defendants any unexpected or undue hardship. However, in view of the fact that the 29% goal for non-white membership in Local 28 is no longer viable on the present timetable, especially in view of the merger into Local 28 of five other locals with predominantly white membership, the court contemplates further modification of the RAAPO upon receipt of the Administrator's report respecting the impact of the merger upon the RAAPO. The Administrator's report should include a recommendation for appropriate modification of the RAAPO.

SO ORDERED.

DATED: New York, New York
August 16, 1982

/s/ HENRY F. WERKER
U.S.D.J.

NOTES

1. By orders dated July 30, 1979 and March 12, 1980, the Administrator directed that the plaintiffs serve upon all private contractors who have contracts with Local 28 copies of the O&J and the RAAPO. A number of the respondents apparently were not served however.
2. The term non-white is used to refer to black and Spanish surnamed individuals.
3. The apprenticeship program is one of four methods by which a person may become a member of Local 28. The other three methods are: (1) members of sister unions to Local 28 in the construction industry may transfer in through the issuance of permits; (2) by passing a battery of journeyman tests, a person may be admitted to Local 28 as a journeyman; (3) through the organization of nonunion shops by Local 28.
4. The record is replete with examples of the defendants' failures to comply with the recordkeeping and reporting provisions of the RAAPO, the O&J, and the orders of the Administrator. See Pl. PFF&CL at 24-28.

Appearances:

*Attorney for the plaintiff City of New York
Corporation Counsel*
100 Church Street
New York, New York 10007
By: Charles R. Foy, Esq.

*Attorney for the plaintiff State of New York
Attorney General for the State of New York*
Two World Trade Center
New York, New York 10047
By: Deborah Bachrach, Esq.
Sheila Abdus-Saláam, Esq.
Nolan A. Bowie, Esq.

Attorney for the plaintiff EEOC
90 Church Street
New York, New York 10007
By: Sandy Hom, Esq.

Attorney for the defendant Local 28
Townley & Updike
405 Lexington Avenue
New York, New York 10017
By: Kenneth J. McCulloch, Esq.
and
Edmund D'Elia, Esq.
919 Third Avenue
New York, New York 10022

Attorney for the defendants JAC and Employers' Association
Rothberg & Tuminaro
16 Court Street
Brooklyn, New York 11241
By: William Rothberg, Esq.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
the City of New York,

Plaintiffs-Appellees,

v.

LOCAL 638 ... Local 28 of the Sheet Metal Workers' Interna-
tional Association and Local 28 Joint Apprenticeship Committee,

Defendants-Appellants,

Sheet Metal and Air-Conditioning Contractors' Association of New
York City, Inc., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

No. 1302, Docket 76-6003.

United States Court of Appeals,
Second Circuit.

Argued April 28, 1977.

Decided Oct. 18, 1977.

Local sheetmetal workers union and the local joint apprenticeship committee appealed from affirmative action program order of the United States District Court for the Southern District of New York, Henry F. Werker, J. The Court of Appeals, J. Joseph Smith, Circuit Judge, held that: (1) there was ample evidence to support district court's findings of discrimination against nonwhites by union local; (2) substitution of a new board of examiners for admission of journeymen for the former examining board was an appropriate measure; (3) portion of order allowing direct admission to union based on experience after screening by board of examiners was appropriate as was provision for reduction and deferment of initiation fees, and (4) those portions of plan providing for indenturing of and work rotation by apprentices without a New York City residence requirement and providing for indenturing of and work rotation by apprentices without a New York City residence requirement and providing for a nonwhite membership goal of 29% were also approved.

Affirmed.

Meskill, Circuit Judge, filed a dissenting opinion.

Sol Bogen, New York City, for defendants-appellants.

Mary-Helen Mautner, Atty., Equal Employment Opportunity Comm'n, Washington, D.C. (Robert B. Fiske, Jr., U.S. Atty., Southern District of New York, Taggart D. Adams and Louis G. Corsi, Asst. U.S. Attys., New York City, Abner W. Sibal, General Counsel, Equal Employment Opportunity Comm'n, Washington D.C., Joseph T. Eddins, Jr., Associate Gen. Counsel, Beatrice Rosenberg, Asst. Gen. Counsel, EEOC, Washington, D.C., of counsel), for plaintiff-appellee Equal Employment Opportunity Commission.

Ellen Kramer Sawyer, New York City (W. Bernard Richland, Corp. Counsel of the City of New York, Gerald J. Dunbar, New York City, of counsel), for appellee City of New York.

Before SMITH, OAKES, and MESKILL, Circuit Judges.

J. JOSEPH SMITH, Circuit Judge:

Local 28 of the Sheet Metal Workers' International Association ("Local 28") and the Local 28 Joint Apprenticeship Committee ("JAC") appeal from an Affirmative Action Program and Order ("AAP & O") entered in the United States District Court for the Southern District of New York, Henry F. Werker, *Judge*, following a finding that Local 28 and JAC had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by discriminating against non-whites in various membership practices.

Local 28 and JAC appealed the finding of liability and the remedies initially imposed by the district court.¹ We affirmed the finding of liability and approved the AAP & O subject to two modifications. 532 F.2d 821 (2d Cir. 1976). A revised plan and order, pursuant to our opinion, was entered by the district court on January 19, 1977.² The instant appeal challenges six provisions of this revised affirmative action plan. Our previous opinion covers the factual and legal background of the appeal, and we turn directly to the questions now before us.

For the reasons outlined below, we affirm the district court's order.

The Examining Board

In accord with Judge Werker's order, a court-appointed administrator was granted extensive supervisory power over Local 28 and the JAC. The administrator is responsible for developing and enforcing detailed plans for achieving the goals outlined in Judge Werker's decree. As part of this responsibility the

¹ While the initial appeal to this court was pending, the AAP & O was modified by the district court upon motion of the Equal Employment Opportunity Commission and the New York State Division of Human Rights in the light of changed working and employment conditions in the sheet metal industry in New York City.

² The district court's findings and conclusions of law are reported at 401 F.Supp. 467 (S.D.N.Y. 1975); the first AAP & O is reported at 421 F.Supp. 603 (S.D.N.Y. 1975).

administrator drafted the revised affirmative action plan finally approved by the district court. The plan calls for replacing the established Local 28 Examining Board, responsible for administering a practical test designed to evaluate the ability of applicants to perform duties required of sheet metal journeymen ("the 'hands-on' journeymen's test") with a Board of Examiners, knowledgeable in sheet metal work, consisting of one union representative, one representative selected by the plaintiffs, and one member selected by the administrator. The former Examining Board had consisted of three white members of Local 28 and a chairman. Two of the three members named to the new three-member board are non-white. Appellants challenge the provisions for a three-person board as unnecessary and improper, as reverse discrimination, and as an abridgment of union self-government.

[1-3] Between 1959 and 1975 entry of judgment below the established Local 28 Examining Board had conducted only two journeymen tests, one in 1968 and one in 1969, both under constraint of arbitration awards won by the employers' Contractors' Association to force the union to increase its manpower. Only 24 men, all white, were admitted from among 339 applicants of whom about 15% were non-white, following the 1968 test. The district court concluded that "the test served more as an obstacle to, than a vehicle for, the admission of new journeymen. ... [T]he exam clearly had an adverse impact on non-whites, and as such, without validation, was violative of Title VII." 401 F.Supp. 484. There is ample support for the district court finding in the record. The scope of a district court's remedial powers under Title VII is determined by the purposes of the Act. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Having found a violation of the Act, the district court was not only within its power but under an obligation to fashion a remedy for the violation. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The substitution of the Board of Examiners for the former Examining Board was an appropriate measure designed to assure impartial administration of the journeyman test. The court order did not

specify any particular racial makeup of the new board, and the charge of "reverse discrimination" raised by appellants is entirely unfounded.

Direct Admission Based on Experience

[4] The revised affirmative action plan permits persons who have had four years' experience in sheet metal work or reasonably related experience to apply for direct admission to the union. Applicants must satisfy the Board of Examiners that they have the requisite sheet metal experience. Direct admission was contemplated by this court in its earlier decision where we stated that

[A] heavy burden may be placed upon direct qualification and admission and transfer from allied unions as the means of reaching the 29 percent membership goal. This however seems most appropriate under the circumstances. The persons who are presently eligible for transfer into Local 28 are the persons who have felt the brunt of the union's past discriminatory practices. They are largely older individuals who have been denied entry into Local 28 in the past or who have been forced into essentially segregated unions as a result of Local 28's practices.

532 F.2d 832. Only one year's experience is required to qualify for the journeyman test. There is no reason why persons with substantially more experience, those previously excluded from Local 28 for racial reasons, should be forced to take the journeyman test. Screening by the Board of Examiners provides adequate assurance that unqualified applicants will not be admitted to the union. We find other objections to direct admission raised by appellants to be wholly without merit.

Reduction and Deferment of Initiation Fees

Appellants object to provisions in the affirmative action plan which permit persons admitted to apprentice or journeyman status to apply for payment of reduced or deferred initiation

fees. Application for reduction or deferment must be approved by the union Executive Board or the administrator. Where granted it is designed to permit new members to pay initiation fees which do not exceed the amount of the lowest initiation fee charged to any white individual who was admitted to membership at the time the non-white would have been eligible for membership absent discrimination. This provision was part of the AAP & O approved by us on the previous appeal and at that time was not challenged by appellants. Since we find the provision to be an appropriate remedy designed to eliminate the vestiges of past discrimination, *Rios v. Enterprise Association Steamfitters, Local 638*, 501 F.2d 622, 629 (2d. Cir. 1974), we reaffirm our earlier approval of this provision.

Indenturing of Apprentices and Work Rotation by Apprentices

[5] Under the plan approved by the district court, the JAC is required to indenture two classes of apprentices each year through July 1982, the number to be indentured to be determined by the JAC, subject to review and revision by the administrator in the light of the goals and objectives of the revised affirmative action plan.³ Appellants challenge this provision on the ground that it interferes with union self-government, and that it is improper because it denigrates the apprenticeship examination and will not further the affirmative action goal. We reject the union's challenge on all grounds. The authority to require the regular indenture of a minimum number of apprentices is established. *Rios, supra*, 501 F.2d 626, 634. The administrator was justified in concluding that the long litigation history of Local 28, dating back to 1964, which resulted in a non-white population of only 3.19% in July 1974 and 5.77% in December 1976, required vigorous efforts to assure non-white union membership. Indenture of apprentices is a major route of entry to union membership and as such is appropriately subject to administrator oversight. The balancing of the need for

³ The plan also called for indenturing no less than 36 apprentices by February 1977, and another class of apprentices by July 1977. § 19, Appendix 1846.

training workers against existing economic conditions is appropriately left to his informed discretion. The number of employees ultimately hired is left to the collective bargaining process, and the indenture provision is designed to assure that non-white apprentices will be available for hire when openings occur.

To insure equal opportunity for employment of apprentices a formal referral system has been incorporated in the affirmative action plan. Apprentices are grouped according to classes with a record kept for each apprentice of the number of manhours worked. Apprentices are to be referred out in inverse order of the number of hours worked, and the JAC is directed to rotate the groupings as far as feasible to assure that no one grouping receives a disproportionate share of the work. It is essential that all apprentices have some opportunity to work in order to keep them from dropping out of the program. The rotation system does not abrogate an existing seniority system. Furthermore, counsel for the Contractor's Association conceded that job seniority "has never been the practice in the industry." (Appendix at 1493.) The forced rotation plan is a reasonable method for assuring that all apprentices get a fair allocation of work, especially in a depressed labor market where there are relatively few work opportunities.

The Residence Requirement

The revised AAP & O provides two routes for direct admission to the union, the "hands-on" journeyman test and admission based on four years' experience. Both routes require candidates to be residents of New York City or of one of specified nearby counties.* The union challenges this residence requirement on the ground that the jurisdiction of Local 28 is restricted

* For the "hands-on" journeyman test the counties listed are Nassau, Suffolk and Westchester in New York, and Essex and Passaic in New Jersey. Residence for the direct admission based on four years' experience includes the above counties, plus Bergen, Hudson and Union counties, New Jersey. ¶ 7 (c), Appendix 1839; ¶ 12 (a), Appendix 1842. No explanation is apparent for differing residence eligibilities for the two routes of entry.

to New York City and that is therefore inappropriate to permit non-City residents to qualify for direct admission. Appellees counter by pointing out that Local 28 never had a residence requirement and that some of its officers and members reside outside of New York City.⁵ For this reason, appellees argue, it is reasonable to permit non-New York City residents to qualify for the direct admission programs. Since current union members are drawn from counties outside of the City, we see no valid reason for restricting the direct admission programs to City residents, and approve the residence requirements of the AAP & O.

The Non-White Membership Goal

The union attacks the use of a membership goal computed on the basis of the white/non-white ratio of the labor pool in New York City, while permitting the drawing of new members from a wider area which, if used as the labor pool, arguably could substantially alter the ratio. We think this attack not well founded under the circumstances of this case. On the showing made on the first appeal we approved the 29% ratio as a goal. The district court has now sanctioned drawing applicants from a wider area on a showing that some of the present membership in fact resides in the wider area. On this record we think the jurisdiction of the union is a permissible boundary of the labor pool for setting the goal initially, absent any indication that the jurisdictional boundary is set or manipulated for purposes of discrimination. Some flexibility in permitting nearby residence is in accord with present practice and unlikely greatly to change the ratios. We note that the City of New York does not object, indeed supports the plan as approved.

It is true that we have recently held that "where a significant number of union members come from outside the union's geographic jurisdiction, the court must widen its sights; the appropriate reference area then should be that region from which

⁵ EEOC brief at 19; City of New York brief at 20; Appendix at 968; Appendix at 971-972.

the union draws its members." *EEOC v. Local 14*, 553 F.2d 251, 254 (2d Cir. 1977). See also *Hazelwood School District v. United States*, — U.S. —, n. 17, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). In *Hazelwood* and in *Local 14*, however, the court was concerned with a statistical basis for a finding of discrimination. Here we have no such problem, discrimination having been established by direct evidence of long-standing practices. See *EEOC v. Local 638*, 532 F.2d 821, 826.⁶

Judge Werker carefully analyzed the available statistics as to the make-up of the labor pool in the jurisdictional area in arriving at the 29% ratio. If an insignificant number of union members live in New Jersey and the outlying New York counties we see no inconsistency between using a membership goal based on a New York City labor pool and permitting individual applicants for union admission to live outside the City. *EEOC v. Steamfitters*, 542 F.2d 579, 591 (2d Cir.), *cert denied*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977). Had it been established that a "significant number" of Local 28 members resided outside of New York City, it might have been necessary to redefine the relevant labor pool for Local 28 accordingly.⁷ In the absence of a reliable basis for such findings we are satisfied that it was not error for Judge Werker to approve the application of the jurisdictional territory ratio to a membership drawn

Affirmed.

⁶ The argument that the union clearly had no control over the racial composition of transfers from sister locals or men in newly organized shops is refuted by the record in the earlier appeal, where there was evidence that Local 28 denied transfer to blacks while admitting whites from the same union with no greater qualifications.

⁷ The labor pool figures would then be adjusted to include the entire area from which current members and applicants are drawn. If this were done, a new goal could be set based on the enlarged area but adjusted to reflect the relatively smaller number of union members drawn from the outlying areas rather than New York City as a result of the effect of distance, cost and time of travel, and other related factors.

from a somewhat wider permissible residential area.⁸

MESKILL, Circuit Judge, dissenting:

I respectfully dissent. The majority opinion fails to apply the principles set out in the recent decision of the Supreme Court in *Hazelwood School District v. United States*, — U.S. —, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), and our own decision in *Equal Employment Opportunity Commission v. Local 14*, 553 F.2d 251 (2d Cir. 1977). These decisions cast substantial doubt on the existence of illegal discrimination by these unions; there is no question that they require a remand to fix the hiring goal at a more reasonable figure.

⁸ We fear that our dissenting brother has misconceived the basis for our earlier opinion in this case, 532 F.2d 821 (1976). It was based on direct and overwhelming evidence of purposeful racial discrimination over a period of many years. It did not rely on inferences from racial ratios of population and employment in the area to establish a *prima facie* case of discrimination.

We pointed out, 532 F.2d at 825-27, some examples of the direct methods employed to deny members of racial minorities entrance to the union, including discriminatory examinations for entrance to the apprenticeship program, cram courses paid for by union funds for sons and nephews of members, unavailable to minority applicants, refusal to accept the blowpipe workers for membership because of their predominantly minority make-up, consistent discrimination in favor of white applicants for transfer from sister construction unions while denying transfer to blacks with equivalent qualifications, issuance of temporary work permits to white members of allied construction unions, some from far away, while denying them to minority group sheet metal workers already residing in the New York City area.

We are not limited here, therefore, in determining proper relief by *Local 14*, 553 F.2d 251 (2d Cir. 1977), nor by *Hazelwood School District v. United States*, — U.S. —, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), which were concerned with ratios as *prima facie* proof of discrimination. We see no need, therefore, to discuss the doctrine of the law of the case in relation to "self correction of judicial error." Nor do we see the necessity for a retrial of the issue of racial discrimination, further prolonging this litigation after more than thirteen years of effort by state and federal tribunals to end the thoroughly proven discrimination.

I.

The majority opinion suggests that the finding of discrimination and the fixing of the hiring goal are insulated from review by our prior holding in *Equal Employment Opportunity Commission v. Local 638*, 532 F.2d 821, 830 (2d Cir. 1976). To the contrary, the doctrine of law of the case does not bar us from reconsidering and correcting our prior erroneous holding.

It is hornbook law that an appellate court must apply the law as it stands at the time of its decision. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801). When an appellate court has previously passed on some of the questions presented, but remanded for reconsideration of others, the general practice is to avoid re-examination of the issues determined by the first appeal. However, this is not a question of judicial power, but of judicial economy. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 178 (2d Cir. 1967), *cert denied*, 390 U.S. 956, 88 S.Ct. 1038, 20 L.Ed.2d 1151 (1968). As Professor Moore notes, this doctrine of law of the case is not a barrier to "self-correction of judicial error." 1B Moore's Federal Practice ¶ 0.404[1], at 401 (2d ed. 1974). Thus, a court is always free to exercise its discretion to reconsider its previous rulings in a case before it. ¹ *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912) (Holmes, J.); *Perrone v. Pennsylvania R. Co.*, 143 F.2d 168, 169 (2d Cir. 1944) (Frank, J.); *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940) (Magruder, J.); *Higgins v. California Prune & Apricot Grower, Inc.*, 3 F.2d 896 (2d Cir. 1924) (L. Hand, D.J.).

¹ Of course, the Supreme Court is not bound by our law of the case. 1B Moore's Federal Practice ¶ 0.404[10], at 574 (2d ed. 1974). Since *Hazelwood* and *Teamsters* are decisions of the Supreme Court, our prior decisions to the contrary in this case will carry no weight on certiorari, and applying law of the case is an exercise in futility. *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940) (Magruder, J.). The only effect can be further proceedings and waste of time, precisely the evils which law of the case is meant to avoid.

When a change in controlling law intervenes between two proceedings in the same court, the judgment should be modified to conform to current law insofar as it requires a future course of conduct. This is true whether the change is the result of statutory amendment, *System Federation v. Wright*, 364 U.S. 642, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32, 15 L.Ed. 435 (1855), or an intervening decision by the same court, *Davis v. United States* 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974) (intervening decision by same Court of Appeals); *Hampton v. Graff Vending Co.*, 516 F.2d 100, 103 (5th Cir. 1975) (same). Thus, where a party, as here,

² In *Wright*, the conduct involved, organizing a "union shop," had actually been unlawful at the time it was enjoined. Here, by contrast, the injunction was based upon an erroneous construction of Title VII. Also, *Wright* was a stronger case for applying law of the case, since it involved a consent decree rather than, as here, a fully litigated controversy.

Both *Swift* and *Wright* state that an injunction must be modified if transformed by a change of law into an "instrument of wrong." However, *Wright* makes it clear that this means merely that a party is restrained from carrying out what has become a legal course of conduct. The opinion states:

Had the 1945 decree simply represented relief awarded by the District Court after a trial of the action instituted by petitioners, there could be little doubt but that, faced with the 1951 amendment to the Railway Labor Act, it would have been improvident for the court to continue in effect this provision of the injunction prohibiting a union shop agreement as being unlawful *per se*, or its use as an instrument to effectuate to her statutorily forbidden discriminations. That provision was well enough under the earlier Railway Labor Act, but to continue it after the 1951 amendment would be to render protection in no way authorized by the needs of safeguarding statutory rights at the expense of a privilege denied and deniable to no other union.

364 U.S. at 648, 81 S.Ct. at 371. See *Theriac v. Smith*, 523 F.2d 601 (1st Cir. 1975) (vacation of consent decree to conform with subsequent decision of the Supreme Court); 11 C. Wright & A. Miller, Federal Practice and Procedure §§ 2863, 2961 (1973); Developments in the Law — Injunctions, 78 Harv.L.Rev. 994, 1082 (1965).

is under a continuing injunction barring conduct once considered unlawful, but now permitted, it is an abuse of discretion not to conform the injunction to prevailing law. *System Federation v. Wright*, *supra*, 364 U.S. at 646-50, 81 S.Ct. 368 (Harlan, J.).² See *United States v. Swift & Co.*, 286 U.S. 106, 114-15, 52 S.Ct. 460, 76 L.Ed. 999 (1932) (Cardozo, J.).

Even though the challenged decree commands actions thought beneficent, these principles must be applied. Thus, in *Passadena City Board of Education v. Spengler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976), the Supreme Court was faced with a decree meant to prevent re-segregation of a school district already integrated by court order. After the decree was entered, the school district did not appeal. Subsequently, the Supreme Court's decision in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), made it clear that the district court had exceeded its authority in ordering such relief. The defendants sought a modification of the injunction under Fed.R.Civ.P. 60(b)(5), which was denied, and the Court of Appeals affirmed this decision. The Supreme Court reversed. It held that law of the case did not insulate the decree from attack and that, insofar as it governed future conduct, the district court should have conformed it to current law. 427 U.S. at 437-38, 96 S.Ct. 2697.

There can be no doubt that *Hazelwood* and *Local 14* significantly changed the law, delimiting for the first time the standard for selecting the labor force used as a benchmark in establishing a *prima facie* case of discrimination. *Hazelwood*, *supra*, ___ U.S. at ___, 97 S.Ct. 2736; *Local 14*, *supra*, 553 F.2d at 254. The majority opinion as much as concedes their relevance. It states:

It is true that we have recently held that "where a significant number of union members come from outside the union's geographic jurisdiction, the court must widen its sights; the appropriate reference area then should be that region from which the union draws its members." *EEOC v. Local 14*, 533 F.2d

251, 254 (2d Cir. 1977). See also *Hazelwood School District v. United States*, ___ U.S. ___, n. 17, 97 S.Ct. 2736, 53 L.Ed.2d 768 (June 28, 1977). In *Hazelwood* and in *Local 14*, however, the court was concerned with a statistical basis for a finding of discrimination. Here we have no such problem, discrimination having been established by direct evidence of long-standing practices. See *EEOC v. Local 638*, 532 F.2d 821, 826.

553 F.2d at 2 (footnote omitted). This circular argument proves nothing at all. The discrimination that was "established by direct evidence" was premised upon the challenged test, which cannot possibly be its own justification. *Hazelwood* and *Local 14* set out the test to be used in establishing discrimination, and conclusively demonstrate that the finding of liability in the earlier proceedings was based on incorrect standards. I am at a loss to see how a determination of liability under an erroneous test insulates itself from judicial scrutiny once the correct test is laid out by the Supreme Court. The majority should concede that we have no discretion to apply law of the case when the holding of the first appeal has been discredited by the Supreme Court. *Zdanok v. Glidden Co.*, 327 F.2d 944, 951 (2d Cir. (Friendly, J.), *cert. denied*, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964); *Higgins v. California Prune & Apricot Grower, Inc.*, *supra*, 3 F.2d at 897 (2d Cir. 1924) (L. Hand, D.J.). Because neither the district court nor the first panel that heard this case had these decisions before it, the case should be remanded for reconsideration in the light of subsequent developments.

II

In this case, the plaintiffs established their *prima facie* case of discrimination by proving that the percentage of minority workers in the union was substantially less than the percentage of minority workers in the population. The district court, and now the panel majority, endorse this view. However, under our decision in *Local 14*, this finding resulted from the application of a clearly erroneous legal standard.

Title VII is addressed only to discrimination which has occurred since the effective date of the Act. *Hazelwood, supra*, — U.S. —, 97 S.Ct. 2736; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The district court, the original panel decision and the majority here, however, looked to employment figures which included pre-Act membership in the union to establish a prima facie case of discrimination. In *Hazelwood*, the Court of Appeals concluded that a school district which has 1.8 percent minority teachers, in an area whose labor pool was 5.7 percent minority, had unlawfully discriminated. In vacating the decision, the Supreme Court stated:

The Court of Appeals totally disregarded the possibility that this prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes. For this reason, the Court cautioned in the *Teamsters* opinion that once a prima facie case has been established by statistical work force disparities, the employer must be given an opportunity to show "that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination." [— U.S.at —, 97 S.Ct. at 2742].

The record in this case showed that for the 1972-1973 school year, Hazelwood hired 282 new teachers, 10 of whom (3.5%) were Negroes; for the following school year it hired 123 new teachers, five of whom (4.1%) were Negroes. Over the two-year period, Negroes constituted a total of 15 of the 405 new teachers hired (3.7%). Although the Court of Appeals briefly mentioned these dates in reciting the

facts, it wholly ignored them in discussing whether the Government had shown a pattern or practice of discrimination. And it gave no consideration at all to the possibility that post-Act data as to the number of Negroes hired compared to the total number of Negro applicants might tell a totally different story.

— U.S.at —, 97 S.Ct. at 2743 (footnotes omitted). We reached the identical conclusion in *Local 14, supra*, 553 F.2d at 254.

It is by no means a futile gesture to allow this union a chance to produce such evidence. In *Local 14* we overturned a finding of liability against another construction union whose jurisdiction was New York City. That union had a minority membership of 6.5 percent; however, when its post-Act hiring was compared to the appropriate population figures, we found the question of discrimination sufficiently doubtful to remand the case for a proper hearing. This union had a minority membership of 5.77 percent in December, 1976, fairly close to the figure in *Local 14*. As the district court found, less than one-third of the membership has joined this union since the effective date of Title VII. See *Local 638, supra*, 532 F.2d at 824; 401 F.Supp. at 474. Moreover, the record does not reveal how much control the union had over direct transfers and organization of non-union shops.³ Nor does the majority take account of the extremely depressed conditions in the construction industry in New York during the period in question. Finally, the district court did not have before it the "applicant-flow data deemed essential by the Supreme Court in *Hazelwood*. See — U.S.at —, 97 S.Ct. 2736 (Brennan, J., concurring). Without clear findings on these matters, we are in a position to affirm neither the finding of discrimination nor the broad remedial order. As the *Hazelwood* Court concluded:

It is thus clear that a determination of the appropriate comparative figures in this case will depend

³ As is clear from the district court opinion, the discriminatory organization of non-union shops took place in "the late 1950's and early 1960's," 401 F.Supp. at 485, before the effective date of the Act.

upon further evaluation by the trial court. As this Court admonished in *Teamsters*, "statistics ... come in infinite variety [T]heir usefulness depends on all of the surrounding facts and circumstances." [431 U.S. at 340, 97 S.Ct. 1843]. Only the trial court is in a position to make the appropriate determination after further findings. And only after such a determination is made can a foundation be established for deciding whether or not Hazelwood engaged in a pattern or practice of racial determination in its employment practices in violation of the law.

— U.S. at ___, 97 S.Ct. at 2744 (footnote omitted).

I do not mean to suggest that this union's history in racial matters is commendable. The blatant pre-Act discrimination is deplorable, the very most that can be said for it is that it was not unlawful. Furthermore, there have been enough subsequent acts of discrimination to support a conclusion that compliance with Title VII has been, at most, grudging and half-hearted.⁴ Nonetheless, Title VII does not empower us to right all the wrongs of society, but only to correct specific illegal conduct. *Equal Employment Opportunity Commission v. Enterprise Ass'n Steamfitters Local 638*, 542 F.2d 579, 592 (2d Cir. 1976), *cert denied*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977). It may well be that the plaintiffs in this action could prevail under a proper test. However, no matter how "just" the result appears, we cannot base a finding of liability on "a wholly inappropriate legal standard of discrimination," *Hazelwood*, *supra*, — U.S. at ___, 97 S.Ct. at 2744 (Brennan, J., concurring), as was done here. Thus, further factfinding is required, which can be accomplished only if the case is remanded to the district court. *Id.* (majority opinion).

III.

There is a second fundamental error in the determination of liability. The district court used the New York City minority population as the standard to determine the existence of

⁴ If it is for the district court to determine if these constitute a "pattern and practice" of discrimination or if they call for individual treatment. *Local 14*, *supra*, 553 F.2d at 255-56.

discrimination. Under our recent decision in *Local 14*, this was clearly erroneous. As Judge Van Graafeiland stated for a unanimous panel:

[W]here a significant number of union members comes from outside the union's geographic jurisdiction, the court must widen its sights; the appropriate reference area then should be that region from which the union draws its members.

533 F.2d at 254. In June, the Supreme Court, in *Hazelwood*, "highlight[ed] the importance of the choice of the relevant labor market area." — U.S. at ___, n. 17, 97 S.Ct. at 2744.¶ The majority ignores the district court's error in this crucial decision.⁵

The district court below determined the minority population of New York City to be 29 percent, which it used as a benchmark. 401 F.Supp. at 488-89. This was clearly incorrect in light of *Hazelwood* and *Local 14*. The error is underscored by the fact that the court below expanded the areas from which minority membership would be drawn on the ground that:

If it be true many of the present membership reside outside the limits of New York City there is no reason why applicants should be restricted to New York City.

421 F.Supp. 603, 618. It may be true, as the majority states, that this is a careful finding of fact that an "insignificant" part of the membership lives outside of New York. I must note, however, that "insignificant" is generally not synonymous with "many". If so, it belies both our earlier decision that the relevant labor pool was "the Metropolitan area," 532 F.2d at 831, and the position taken on this appeal by the EDOC that "many of the present membership reside outside the limits of New York City." Brief of the EEOC at 19. It is abundantly clear that a

⁵ *Hazelwood* dealt with the exact opposite of this situation. There, a district court failed to include the minority population of a central city in a lawsuit against a largely white suburb. It is inconceivable, however, that a different legal standard determines the existence of discrimination in cities and suburbs.

⁶ One commentator has noted that "the geographical delimitation of the relevant population can be the deciding factor in a case." Loptaka, A 1977 Primer on the Federal Regulation of Employment Discrimination, 1977 U. Ill. L.F. 69, 76.

further hearing is necessary, at which proper statistical evidence could be taken.

IV.

The crucial nature of this evidence is illustrated by a comparison with the *Local 14* case. Local 15,⁷ the union involved there, was another construction union whose jurisdiction is New York City. Just as here, there was ample evidence of blatant pre-Act discrimination, resistance to change and substantial individual acts of discrimination after the Act. However unpleasant such conduct is, it does not necessarily make out a prima facie "pattern and practice" case under Title VII. In that case, we indicated that the proper hiring goal was approximately 16.2 percent. Here, four out of every five members taken into the union have come from the apprenticeship program. Minority participation in that program rose from .37 percent in 1965 to 21.8 percent in 1967, fell to 9.77 percent in 1973, and rose to 14 percent in 1974. These figures cast substantial doubt on the finding that the apprenticeship program was discriminatory. Compare *Local 14*, *supra*, 533 F.2d at 254; *Hazelwood*, *supra*, — U.S. at —, 97 S.Ct. 2736. Moreover, the district court confusingly lumped together pre and post-Act discrimination in such areas as the organization of non-union shops, preventing meaningful analysis of the record. 401 F.Supp. at 485-86. There is thus some possibility that the union is not liable under Title VII. In any event, if liability is found, a proper remedy cannot be formulated until the scope of the violation is known. The majority's holding makes this task impossible.

V.

Even if majority's affirmance of the finding of liability is correct, the case still should be remanded for the formulation of a proper remedy. If the district court fixes the proper figure for determining the existence of discrimination, then it logically follows that the same figure is the appropriate target in any affirmative action plan imposed. The rule in Title VII cases, as in all others, is that the remedy is to be fitted to the wrong. Thus, in *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the leading case on remedies under

under Title VII, the Court explicitly adopted this familiar principle:

"The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have been committed." *Wicker v. Hop-pock* [73 U.S. 94] 6 Wall. 94, 99 [18 L.Ed. 752] (1867).

Id. at 418-419, 95 S.Ct. at 2372. See *Dayton Board of Education v. Brinkman*, — U.S. —, —, 97 S.Ct. at 2766, 53 L.Ed.2d 851 (1977), *Milliken v. Bradley*, 418 U.S. 717, 738, 744, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). We expressed the same views in *Local 14*, where we stated:

When a District Court finds that discriminatory practices on the part of a union or an employer have prejudiced minority workers, it should frame its relief with an eye toward remedying the wrong, *see generally Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 [95 S.Ct. 2362, 45 L.Ed.2d 280] (1975), and should interfere with the defendant's operations no more than is necessary to accomplish this result.

553 F.2d at 256.

The majority simply ignores this principle. Instead, it holds, in effect, that the district court, once it has made a finding of discrimination, is free to select a hiring goal on an arbitrary basis, or no basis at all. There can be no other explanation for a holding that, even if 16.2 percent is the appropriate figure for determining the existence of discrimination, 29 percent is the hiring goal which must be set to remedy that discrimination. A simple example will demonstrate the absurdity of this position.

Assume that two unions, in related trades, have jurisdiction over a city whose minority population is 30 percent. The metropolitan area of which the city is a part has an overall

⁷ Local 14 was found liable for discrimination. The remand was ordered for Local 15, a companion union in the same case.

minority population of 15 percent. Both unions' membership live throughout the metropolitan area. On the effective date of the Act, neither union has any minority members.

The first union in this example admits 15 percent minority members after the Act becomes effective; the second union only 10 percent. Under *Hazelwood* and *Local 14*, the first union is in full compliance with Title VII. The second union, however, would be in violation of the Act since it falls short of the 15 percent goal. A minority membership goal of 30 percent within five years could be set by the district court, following the majority reasoning of this case.

After five years, if the second union has succeeded in raising its overall minority membership to 20 percent, it would be in violation of the affirmative action plan imposed. At the same time, the first union, with its 15 percent post-Act minority membership, would be in full compliance with the law. I do not believe that the drafters of Title VII envisioned such an incongruous result.

VI

Finally, this decision will, on balance, retard rather than advance the achievement of non-discrimination in employment. While it may lead to somewhat "more" integration in the central cities, it will halt efforts to integrate suburban employers. Thus, if a union whose jurisdiction is Nassau and Suffolk Counties were found liable under Title VII, I assume that the majority, in order to be consistent, would set the hiring goal by reference to the small minority population of those suburban counties. It would presumably be error to consider New York City's far more substantial minority population. Although this result appears to be compelled by today's decision, it is clear that it will hardly advance the cause of integration. If we are to eliminate the national disgrace of employment discrimination, we must widen, and not restrict, our horizons. I believe that the majority, proceeding from the best of motives, jeopardizes the cause Title VII is designed to serve.⁹

⁹ As we stated in *Local 14*:

We must carefully balance the need for effective enforcement of the Act against overzealous enforcement which can only lead to resentment and a resistance to change. 533 F.2d at 255.

I would vacate the decision of the district court, and remand for a hearing under proper standards.

REVISED AFFIRMATIVE
ACTION PROGRAM AND ORDER
71 CIV. 2877 (HFW)

**United States District Court
Southern District of New York**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP
COMMITTEE, . . . SHEET METAL AND AIR-CONDITIONING
CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

REVISED AFFIRMATIVE ACTION PROGRAM

Introduction

1. Upon the motion of the plaintiffs and the State Division of Human Rights (the "State Division") this Revised Affirmative Action Program ("Revised Program") is adopted after reconsideration and review of the remedial provisions of the Decision and Order dated July 18, 1975, the Order and Judgment dated August 28, 1975 and entered on September 2, 1975 ("Order and Judgment"), the Affirmative Action Program entered November 25, 1975, and the Court of Appeals decision dated March 6, 1976 in light of the present changed working and employment conditions in the sheet metal industry in New York City, including the present severe and widespread unemployment in the industry. The goal of this Revised Program is to assure that in light of these changed circumstances and conditions the non-white* membership in Local Union No. 28 of the Sheet Metal Workers International Association ("Local 28") reaches a minimum level of 29% by July 1, 1982; to assure that substantial and regular progress is made toward this goal in each year prior to 1982; and to assure that all members and

* "Non-white" as used in the Revised Program means black and Spanish surnamed individuals.

apprentices of Local 28 share equitably in all available employment opportunities in the industry.

2. For the purpose of reaching the above goal of 29% by July 1, 1982 this Revised Program establishes the following interim percentage goals for the nonwhite membership of Local 28:

July 1, 1977	8 %
July 1, 1978	11 %
July 1, 1979	15 %
July 1, 1980	19 %
July 1, 1981	24 %

Each of the above percentages shall be measured against the total membership of Local 28 as of each interim goal date, respectively, and the final goal date. For the purpose of measurement, total membership shall include (a) all journeyman members, (b) all pensioners²⁰ who, while on pensioner status, have been employed as sheetmetal workers within the three years prior date which measured, (c) all members or participants in the Local 28 Apprentice Program ("Apprentice Program"), and (d) all individuals who (i) have been offered admission to and membership in Local 28 but have exercised their option, pursuant to Section 16 of the Revised Program or pursuant to a parallel policy adopted by Local 28, to defer such admission and membership and (ii) at the time of measurement have continued to exercise the aforesaid deferment option. The parties to this action and the Administrator are to implement this Revised Program so that the final goal shall be attained. At least once every six months, the Administrator shall review the progress toward the attainment of these interim goals and shall take any such action as he is empowered to take under the Order and Judgment and which is necessary to assure their achievement. In addition, upon his own motion or that of any party, the Administrator is authorized and directed to periodically review the working and employment conditions in the sheetmetal industry in New York City to determine whether

²⁰ "Pensioner" as used in the Revised Program means any individual who receives benefits from the Local 28 pension program.

it is feasible and practical to increase the interim goals or reduce the time period within which any interim goal or the final goal shall be met by Local 28 and the JAC. It is the express purpose and intent of this Revised Program to attain the goal of 29% non-white membership in Local 28 and the Apprentice Program at the earliest practicable time.

3. Admission to Journeyman membership in Local 28 shall be attained only through the following procedures:

- a) Successful completion of 'hands-on' journeyman test administered pursuant to Sections 5 through 11;
- b) establishment of proof of the required experience in the sheetmetal trade pursuant to Section 12; or
- c) successful completion of the Local 28 Apprentice Program; or
- d) transfer in accordance with the Sheet Metal Workers' International Union Constitution and Ritual; or
- e) organization of non-union shops.
- f) the deposit of a previously obtained withdrawal card with the Executive Board of Local 28 and compliance with the relevant provisions of the Sheet Metal Workers' International Union Constitution and Ritual.

4. Membership in the Apprentice Program shall be obtained only through the following procedures:

- a) successful completion of an apprentice aptitude test, as set forth in Sections 18 through 28; or
- b) entry with advanced standing as set forth in Sections 29 through 32.

Admission to Journeyman Status

5. Local 28 shall administer a validated, non-discriminatory, 'hands-on' journeyman's test under the overall supervision and approval of the Administrator no later than March 1, 1978 and at least once a year thereafter at a date, time and place to be set by the Administrator. The Administrator, after consultation with the

parties, may apply to the Court (i) to schedule a 'hands-on' journeyman's test for a date certain prior to March 1, 1978 and (ii) to decrease the frequency of the tests to be administered subsequent to March 1, 1978, consistent with the requirements of the interim goals set forth in Section 2.

6. The 'hands-on' journeyman's tests administered pursuant to Section 5 shall be professionally developed and validated in accordance with EEOC Guidelines. With respect to the test to be administered by March 1, 1978 as required in Section 5, Local 28 shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of the test and (ii) a copy of the test to be administered at a date set by the Administrator, provided that counsel for the parties and the Administrator shall not distribute or disclose the contents of the test to any individual or organization except for the purpose of professional validation thereof. With respect to all subsequent tests administered pursuant to Section 5, Local 28 shall provide the Administrator and counsel for the parties with the information and material described in subdivisions (i) and (ii) herein at least four weeks prior to the schedule date of each test.

7. All qualified applicants shall be eligible to take the 'hands-on' journeyman's test specified in this Revised Program. A qualified applicant is defined as follows: any person who

a) has or will have attained the age of 18 by the date of the test, and

b) is a citizen or lawful permanent resident alien legally entitled to work in the United States, and

c) has resided in New York City or the counties of Westchester (N.Y.), Nassau (N.Y.), Suffolk (N.Y.), Passaic (N.J.), or Essex (N.J.), for six (6) months prior to the filing of an application, and

d) has one year of sheet metal work experience including but not limited to employment as a member in any branch of Local 400 of the Sheet Metal Workers International Association, sheet metal experience in the Armed Forces, or vocational education or training related to the skills of a journeyman sheet metal worker.

Persons presently registered or recently registered in the Local 28 Apprentice Program or any other recognized apprentice program affiliated with the Sheet Metal Workers International Association are not eligible.

8. Subject to the approval of the Administrator, Local 28 shall develop a standardized application form for the 'hands-on' journeyman's test. Such form shall include only the following:

a) provisions for the name, address, telephone number, social security number, citizenship or lawful resident alien status, residency, record of convictions, age, sex and race or ethnic identification of the applicant (with a notation that information regarding race or ethnic identification is required solely for the purpose of compliance with the court order herein and the regulations of the United States Equal Employment Opportunity Commission), and previous sheet metal experience.

b) information regarding the eligibility requirements, fee, date, time, location, and nature of the 'hands-on' journeyman's test.

9. Local 28 shall make available an application form for the 'hands-on' journeyman's test and a short description of the nature of the test in the following manner:

a) at the offices of Local 28;

b) by mail in response to inquiries and requests made by mail;

c) in bulk to plaintiffs, the City Department of Employment, the New York State Employment Service, Recruitment and Training Program, Inc., Fight Back, and the other governmental or community agencies listed in Appendix A as amended from time to time.

Completed applications for the test shall be accepted by mail or delivery in person at the offices of Local 28. Local 28 may establish, with the approval of the Administrator, a suitable cut-off date for the acceptance of applications. Local 28 may establish a fee for the taking of the 'hands-on' journeyman's test.

consistent with the cost of administering such a test. Such fee shall be, provisionally, \$25.00. Local 28 may apply to the Administrator for an increase in this fee upon good cause shown. Applicants shall be informed, in writing, as to the place of examination with instructions as to how to reach the place and/or a map indicating its location.

10. The 'hands-on' journeyman's test shall be graded by a Board of Examiners consisting of three members knowledgeable in sheet metal. Said Board shall be comprised of a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the plaintiffs and the State Division. Said Board shall act by majority vote and shall employ the passing grade level developed pursuant to the validation procedures set for in Section 6. All applicants shall be advised of their status by first class mail within 30 days of the test. Applicants who fail the test shall be advised of their possible eligibility for advanced standing in the apprenticeship program pursuant to Sections 29 through 32 of the Revised Program or pursuant to a parallel policy adopted by Local 28 and/or the Local 28 Joint Apprentice Committee ("JAC").

11. (a) All qualified applicants who pass the test and are physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 within 60 days of the test unless the applicant elects to defer admission pursuant to Section 16, or pursuant to a parallel policy adopted by Local 28.

(b) To the best of their ability the parties and the Administrator shall endeavor to set forth on the application form the most accurate estimate of the employment opportunities available in the industry.

12. Commencing February 1, 1977 there shall be established a program for admission to Local 28 journeyman membership of persons who have had four years experience, obtained in the United States or elsewhere, in sheet metal work or employment reasonably related or similar to sheet metal work, including experience in the Armed Forces, or vocational training related to the skills of a sheet metal worker. Persons eligible for admission under this program must,

a) be a resident of New York City, or the counties of Nassau (N.Y.), Suffolk (N.Y.), Westchester (N.Y.), Bergen (N.J.), Passaic (N.J.), Essex (N.J.), Union (N.J.), or Hudson (N.J.) for six (6) months prior to application; and

b) be age of 18 or over; and

c) be physically fit to perform sheet metal work; and

d) establish to the satisfaction of a majority of a board of three members knowledgeable in sheet metal work, comprised of a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the plaintiffs and the State Division that the applicant has the requisite sheet metal experience; and

e) be a citizen or lawful permanent resident alien legally entitled to work in the United States.

The Administrator, after due consultation with all the parties, shall establish procedures for application to this program, for investigation and verification of the criteria set forth in subsections (a) through (e), and for the timing and conditions of admission. Appropriate publicity for the program shall be undertaken at the direction and with the approval of the Administrator.

13. a) Upon proper application, a non-white eligible for admission to journeyman membership in Local 28 pursuant to Sections 5 through 12 or Section 31(e) of this Revised Program may request of Local 28's Executive Board that the Local 28 initiation fee be reduced pursuant to the provisions of Paragraph 22(d) of the Order and Judgment. Within 5 days of receipt of such application, the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator, and the parties of the disposition of the application (the notification to the Administrator and the parties shall include the name and address of the applicant). If such application is denied in whole or in part, or is not acted upon within five days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the request in writing after duly

considering all the factors set forth in Paragraph 22(d) of the Order and Judgment. In considering such an application the Administrator may require the submission of such information, documents, or other data from either Local 28 or the applicant as he deems necessary.

b) Upon proper application a non-white eligible for admission to journeyman membership in Local 28 pursuant to Sections 5 through 12 or Section 31(e) may request of the Local 28 Executive Board that payment of the Local 28 initiation fee commence with employment and be payable on a pro rated basis, each payment not exceeding 10% of the net pay check, and payable only during periods of employment until the fee is paid. Within 5 days of the receipt of such application the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator, and all parties of the disposition of the application (the notification to the Administrator and the parties shall include the applicant's name and address). If such application is denied in whole or in part or not acted upon within 5 days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the application in writing. The decisions of the Executive Board of Local 28 and the Administrator shall be made having duly considered the financial circumstances of the applicant.

14. a) At any time after an application pursuant to Section 13 has been pending with the Administrator for more than 5 days a non-white eligible for admission to journeyman membership in Local 28 pursuant to Sections 5 through 12 or Section 31(e) of this Revised Program shall be admitted conditionally to journeyman membership upon payment of \$56 dollars and one month's dues pending the determination of the Administrator which shall be made within 30 days of the date of the application to the Administrator. During such conditional membership an applicant will be entitled to all the rights and privileges of regular journeyman membership.

b) If a conditional member is terminated without becoming a regular journeyman member of Local 28 he shall be entitled to a return of any dues paid in advance for any month in which he was not employed and, if he was not employed during his conditional membership, he shall also be entitled to a return of any payment made toward the initiation fee.

15. The granting of any application pursuant to Section 13 shall not diminish any rights or privileges accruing to journeyman membership in Local 28.

16. A person eligible for admission pursuant to Sections 5 through 11 shall be permitted to defer such admission for up to twelve months from the time he is first entitled to be admitted. During such period, a person who has elected to defer may apply to the Administrator for further deferral of admission, and upon a showing of good cause, the Administrator may continue such deferment for such time as the Administrator shall determine. If an applicant invokes his right of deferral he shall be admitted, on the same terms and conditions as he was previously entitled, within 15 days of written notice to Local 28 that he seeks to be admitted, however, upon good cause shown by the applicant, the Administrator may direct Local 28 to admit the applicant in less than 15 days.

17. Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and pursuant to Paragraph 22(f) of the Order and Judgment.

Apprentice Program

18. The JAC shall maintain an Apprentice Program of four years duration or less. The terms and conditions of the apprentice program shall be as set forth in the Collective Bargaining Agreement ("Standard Form of Union Agreement . . . between Local 28 . . . and Sheet Metal Contractors"), the Local 28 Joint Apprenticeship Trust and Indenture, and the rules and regulations thereunder except as modified by the Order and Judgment, the provisions of this Revised Program, or order of the Administrator pursuant to his powers under the Order and Judgment and this Revised Program.

19. a) The JAC shall indenture no less than 36 apprentices by February 1977 and another class of apprentices (in a number to be determined as set forth in subsection (b) below) by July 1977. The JAC shall indenture two classes of apprentices each year up to and including July 1982; the classes shall be indentured in February and July of each year.

b) Upon consideration of the goals of this Revised Program, and the availability of employment opportunities in the industry, the JAC shall forward its recommendation of the number of apprentices to be indentured in each class, no later than 90 days before each class is indentured, to counsel for the parties and the Administrator. Such recommendation shall be accompanied by a report setting forth the basis for the recommendation. Any objections to the recommendation shall be filed with the Administrator no later than 15 days after receipt of the JAC's recommendations and report. The Administrator shall review the recommendations and objections, if any, to determine if the action taken by the JAC is in accord with the goals and objectives of the Revised Program. Upon a finding that the JAC's recommendation does not meet the goals and objectives of the Revised Program the Administrator shall render his determination as to the appropriate number of apprentices to be indentured. The Administrator shall render his determination within 20 days after the date for filing objections.

c) The numbers of apprentices to be indentured shall include those apprentices admitted with advanced standing.

20. a) Seniority among apprentices shall not be a criterion for employment, and apprentices may be rotated for employment where necessary and feasible pursuant to subsection (c) of this section.

b) The JAC shall make every effort to provide apprentices with classroom instruction, including evenings and Saturdays where necessary, during periods of unemployment, and shall credit such hours toward fulfillment of apprenticeship requirements. The JAC may authorize the accelerated advancement or graduation of any apprentice as it deems proper.

c) The JAC shall establish an employment referral system which shall incorporate the following elements:

(i) A list of all apprentices shall be established in three groupings. Group one shall contain apprentices in terms 1, 2, 3; Group two shall contain apprentices in terms 4,5,6; Group three shall contain apprentices in terms 7 and 8.

(ii) A record shall be kept for each apprentice of the number of manhours worked within each group and the JAC shall refer out apprentices in inverse order to the number of manhours worked (so that apprentices with the lowest number of manhours shall receive referrals first).

(iii) To the extent feasible the JAC shall rotate the groupings to insure that no one grouping, or persons therein, receive a disproportionate amount of work.

(iv) The JAC shall provide counsel for the parties and the Administrator with monthly reports. Such reports shall include but not be limited to: A) all apprentices by name, ethnic status, term, grouping, number of manhours worked, and name of contractor(s) that the apprentice is assigned to; and B) summary of manpower reports showing the number of journeyman and apprentices working for all employees.

The JAC shall provide counsel for all parties and the Administrator with a proposed referral system incorporating the above elements, on or before April 1, 1977.

d) The JAC shall take all reasonable steps, in addition to those set forth in subsections (a) through (c) of this section, to insure that apprentices receive adequate employment and/or training opportunities. Such steps shall include but not be limited to the following:

(i) Advising counsel for all parties and the Administrator whenever an employer receives a contract from the City, State, or Federal Government.

(ii) Advising such employers of their obligations under City Executive Order 71, New York State Labor Law 220e (and any New York State Executive Order 45), and Federal Executive Order 11246.

(iii) Reporting to counsel for all parties and the Administrator the names of any sheet metal employers which, based upon manhour computations, appears to be out of compliance with the appropriate statute, executive order, and/or rule and regulation.

(iv) Taking all necessary steps to seek out and apply for governmental manpower training funds. The JAC shall advise counsel for all parties and the Administrator what actions it is taking in this regard and shall provide a copy of any funding proposal to the Administrator prior to its submission to the funding agency.

21. Upon successful completion of the Apprentice Program, apprentices shall be promptly admitted to full journeyman membership upon payment of the balance due of the initiation fee, if any, which upon application to the Local 28 Executive Board may be paid on an installment basis for good cause shown, and subject to the procedures contained in Section 13.

22. Applications for the Apprentice Program shall be made available to and accepted from any qualified candidate. A qualified candidate is defined as follows: any person who is deemed physically fit for sheet metal work and who has or will have attained the age of 18 years by the date of indenture of the next scheduled apprentice class and who is not older than 25 years of age (for veterans of active military duty the age limit is extended one year for each year of such duty up to the age of 30) and for non-whites not over the age of 35 applying for advanced standing, and who is a citizen or permanent resident alien.

23. With the approval of the Administrator, the JAC shall develop a standardized application form for the Apprentice Program. The application form shall include information about the date of the next class of apprentices to be indentured, and shall require only the following information of the applicant:

- a) Name, address and telephone number;
- b) Birth date and age;
- c) Social Security number;

- d) Extent of education;
- e) Sex;
- f) Race or ethnic classification (with a notation that this information is required solely for the purposes of compliance with federal anti-discrimination statutes);
- g) Military service;
- h) Convictions and pending criminal charges;
- i) Citizenship or lawful permanent resident alien status.

24. Application forms for the apprentice Program shall be available at the offices of the JAC during normal business hours and at the offices of the organizations listed in Appendix A at least 60 days before an examination. Application forms shall be made available by mail upon written request. Completed applications shall be accepted in person or by mail at the offices of the JAC. There shall be a filing fee of no more than \$15.00. Application forms shall be made freely available to any governmental employment office and minority community organizations not listed in Appendix A upon request. The time for filing applications for a particular apprentice test may be closed by the JAC at a reasonable time (not to exceed three weeks) before the date of the examination.

25. a) An apprentice aptitude test shall be given in December, 1977 and at least once yearly thereafter at a date, time and location approved by the Administrator. The test shall consist of the following: (i) a mechanical comprehension test, which has been validated under EEOC Guidelines, similar in substance and scope to the mechanical comprehension test administered by JAC in April 1969, and/or (ii) a spatial relations test, which has been validated under EEOC Guidelines, similar in substance and scope to the spatial relations test given in December 1975. The Administrator, after consultation with the parties, may apply to the Court to decrease the frequency of the tests consistent with the requirements of the interim goals set forth in Section 2.

b) The JAC may apply to the Administrator to give a basic "read and follow directions" test which has been validated under EEOC Guidelines and is designed to ascertain an applicant's ability to master and understand those written and verbal instructions, directions, and other communications necessary to participate in the Apprentice Program at the first year level; upon good cause shown, the Administrator shall authorize the administration of such a test as part of the apprentice aptitude test. There shall be professionally developed and validated a qualifying score on the "read and follow directions" test designed to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level. The JAC may also apply to the Administrator to give a math test as part of the apprentice aptitude test, and such test may be given upon good cause shown. Such math test shall be professionally developed and validated (pursuant to EEOC Guidelines) as to content and qualifying score in such manner as to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level.

(c) With respect to the apprentice aptitude test which is to be administered in December 1977, on or before May 1, 1977, the JAC shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of the test and (ii) a copy of the test to be administered, provided that counsel for the parties and the Administrator shall not distribute or disclose the contents of the test to any individual or organization except for the purpose of validation thereof. With respect to all subsequent tests administered pursuant to this section, the JAC shall provide the Administrator and counsel for the parties with the information and material requested in subsections (i) and (ii) herein at least four weeks prior to the schedule date of each test.

26. Within three weeks of the administration of an apprentice aptitude test, JAC shall provide the Administrator and all parties with:

- a) the names, race and ethnic identification, raw scores and rank of all candidates on all tests; and
- b) the mean and median scores on all tests of all identifiable racial and ethnic groups among the candidates.

27. In fulfillment of JAC's and Local 28's obligations under Section 19, apprentices chosen by means of the apprentice aptitude test shall be selected on the basis of the ranking of scores (highest first) received on the mechanical comprehension test and/or the spatial relations test among all eligible candidates.* If a "read and follow directions" test and/or a math test is administered pursuant to Section 25, then ranking and selection based upon scores on the mechanical comprehension test and/or the spatial relations test shall be from among those applicants who meet or exceed the qualifying score on the "read and follow directions" test and/or the math test.

28. Persons selected for the Apprentice Program may be required to appear for orientation and a physical examination prior to being indentured. The cost of physical examinations are to be borne one half by successful applicants and one half by the JAC. Additional persons may be invited to orientation and a physical examination by Local 28 JAC if that appears desirable. Persons selected in accordance with the above procedures shall be indentured as apprentices unless such indenturing is waived by them, or they are certified physically unable to perform sheet metal work by a medical practitioner licensed in New York State.

ADVANCED APPRENTICES

29. There shall be established by the JAC procedures for the admission and advanced placement in the Apprentice Program of non-white apprentices who have experience in sheet metal work or trade education but cannot perform at journeyman level.

* Apprentices chosen for the July 1977 class shall be selected on the basis of ranking of scores received on the spatial relations test MAT 8 and MAT 9 given December 1975.

Applicants for advanced placement shall have at least six months experience in sheet metal work or trade education, be physically fit and shall be not less than 18 years old or more than 35 years old by the date of indenture of the next scheduled apprentice class.

30. The Training Coordinator of JAC (the "Coordinator") shall evaluate the experience of all applicants for advanced standing and shall make placement of appropriate grade level. The grade level assigned shall be conditional for a period to be determined by the Coordinator, not exceeding three months, based upon classroom work and on the job performance. Applicants who challenge the grade level assigned shall be advised of their right to appeal to the Administrator.

31. a) The Administrator shall determine the number of advanced apprentices to be admitted from the list resulting from each test, based upon the needs of the Apprentice Program at any given time and the number of applicants eligible for advanced standing as certified by the Coordinator.

b) Apprentices who meet the requirements of Section 29 shall be selected for advanced standing in the following manner:

(i) Those whose ranking on the apprentice aptitude examination qualifies them for acceptance into the Apprentice Program pursuant to Section 19 shall be selected in accordance with their ranking and admitted with advanced standing subject to the number determined by the Administrator pursuant to subdivision (a) of this Section.

(ii) If there are insufficient apprentices who qualify for advanced standing selected by the procedure contained in subdivision (b)(i) of this section to satisfy the number determined by the Administrator, additional apprentices to reach this number shall be selected in ranked order, from those who are over 25 years of age and whose score on the apprentice aptitude examination places them below the number otherwise selected pursuant to Section 19.

c) The number of apprentices admitted with advanced standing under subdivision (b)(i) of this section shall be included in the number of apprentices selected pursuant to

Section 19. The number of apprentices admitted with advanced standing under subdivision (b)(ii) of this section shall not be included in the number of apprentices selected pursuant to Section 19.

d) An advanced apprentice shall be entitled to all rights, privileges and other benefits including work referral, pay, instruction, and supervision accruing to regular apprentices at the same level of training.

e) Apprentices admitted with advanced standing pursuant to Sections 29 through 31 who successfully complete the Apprentice Program may make the applications provided for in Section 13 of this Revised Program.

f) Advanced apprentices assigned for work may be utilized to satisfy City and City-assisted contract requirements for the employment of minority trainees.

32. The Coordinator shall develop a pre-examination study group program so as to familiarize all applicants for the Apprentice Program with the type of test that they will be given. All applicants shall be notified in writing at least two weeks in advance of the apprentice aptitude test that the study program is available to them. Such notice shall contain the date, time and location of the study group meetings. The meetings shall be held in the evening after 6:30 P.M. At such time as shall be determined by the Administrator but in no event later than 60 days prior to the test date, the Coordinator shall submit a detailed program including but not limited to teaching methodology, program materials, and the organization of the groups.

Records

33. In addition to any other records or lists required to be maintained under the terms of this Revised Program or the Order and Judgment, Local 28 and JAC, as the case may be, shall maintain separately for whites and non-whites, records and lists containing the following information, beginning with the effective date of the Affirmative Action Program entered on November 25, 1975.

a) Persons who request an application for or apply to take the "hands-on" journeyman's test described in Section 5;

b) Persons who take the "hand-on" journeyman's test described in Section 5;

c) Persons who pass the "hands-on" journeyman's test described in Section 5;

d) Persons who apply for journeyman admission on the basis of experience, described in Section 12;

e) Persons who are admitted, and those rejected, for journeyman membership on the basis of experience, described in Section 12;

f) Persons who seek or apply to transfer into Local 28 from an affiliated sister local union;

g) Persons who inquire of Local 28 about the possibility of transferring into Local 28 from an affiliated sister local union;

h) Persons who inquire of Local 28 as to the availability of work opportunities with or through Local 28, including but not limited to inquiry about or seeking "permits" or "identification slips;"

i) Persons to whom "permits" or "identification slips" are issued or work opportunities with or through Local 28 are otherwise made available;

j) Persons who contact Local 28 or JAC seeking sheet metal work;

k) Persons who are employed as sheet metal workers or apprentices by Local 28 contractors;

l) Persons working in sheet metal shops at the time they are organized by Local 28;

m) Persons who are reinstated to journeyman membership or membership in the Apprentice Program;

n) Non-whites who apply for advanced standing in the apprenticeship program described in Sections 29-32;

o) Non-whites who are granted advance standing in the apprenticeship program and the standing granted as described in Sections 29-32;

p) Persons who are reinstated to journeyman membership in Local 28 having previously exercised withdrawal privileges.

The records and lists specified in subsection (a) through (o) of this Section shall contain the name, address, race, or national origin, union affiliation, if any, of each individual listed therein, as well as the date of the application, test, inquiry, contact, or employment (and the name of the contractor, where applicable), and the disposition with reasons, of each such application, test, inquiry contact or employment. Copies of these records and lists shall be submitted to counsel for the parties and the Administrator at least once every three months.

Said records and lists may exclude telephonic requests for information. However individuals requesting information by telephone shall be informed that their requests should be made in writing, and a form for this purpose shall be sent to such individual.

34. Local 28 or JAC, as the case may be, shall submit the following data to the Administrator and the parties at the time specified:

a) the name and ethnic identity of persons admitted into (i) journeyman status in Local 28 or (ii) apprentice status in the Apprentice Program within 5 days of such admission;

b) on January 1 and July 1 of each year the total number of (i) journeyman members of Local 28 (as defined in Section 2), and (ii) apprentices. Such reports shall include the percentage of non-whites in each group.

35. The JAC shall maintain complete records of all applications and other material concerned with the selection and work records of apprentices. These records shall include but not be limited to an applicant log for each examination showing the name, ethnicity, date of birth of each applicant, dates of completion of each step in the application procedure, and

disposition of each step in the application procedure, and disposition of each application. All such records shall be made available for inspection and copying by the plaintiffs and the State-Division at reasonable intervals during normal working hours or at other mutually convenient times. In addition, records shall be submitted to the Administrator and plaintiffs as follows:

a) Prior to each apprentice entrance test and within 7 days or the closing of the application procedure the JAC shall submit a report including the following information for each person who filed or requested an application for that apprentice examination: name, address, telephone number and race or national origin, if known, for those who request applications.

b) Within 20 days after indenturing a class of apprentices the JAC shall provide a report of the names and ethnic classification of all persons who were rejected during the application and testing period and the reason therefore and the names of all persons whose application became inactive and the reason therefore.

c) Every six months subsequent to the indenturing of a class of apprentices the JAC shall furnish a report giving the names of all non-white apprentices, the name(s) of contractors to which each was referred and the number of hours worked. Such report shall be a summary of the reports required to be filed monthly pursuant to Section 20(c).

d) The Joint Apprenticeship Committee shall furnish the names of all non-white apprentices who are dropped from the Apprentice Program. Said information shall be furnished within twenty days from the date action is taken by the Joint Apprenticeship Committee. Said report shall contain the reason why the individual was dropped from the Program and the steps taken by the Joint Apprenticeship Committee to retain the individual in the Program. The report shall also include the training and employment history of the individual while he was in the Program. The Joint Apprenticeship Committee shall furnish the names of all non-white apprentices who leave the Program other than by action of the JAC. Such report shall contain the reason the apprentice has

left the Program as ascertained by an exit interview diligently attempted. Said information shall be furnished within twenty days from the time the JAC is notified that the apprentice has left the Program.

36. All records and lists required to be compiled by the Revised Program shall be maintained for ten years and shall be made available for inspection and copying by the parties and the Administrator on reasonable notice during regular business hours or at any other mutually convenient time without further order of the court.

Advertising and Publicity

37. The parties shall use their best efforts to disseminate accurate information to the non-white community of opportunities within Local 28 and the Apprentice Program.

38. Prior to each "hands-on" journeyman's test and apprentice aptitude test, at a time to be selected by the Administrator to insure full coverage and effectiveness, Local 28 (in the case of the "hands-on" journeyman's examination) and JAC (in the case of apprentice aptitude tests) shall undertake a program of advertising and publicity, under the overall supervision of the Administrator, designed to inform the non-white community in New York City of the date, location, and nature of such examinations, the qualifications therefor and the opportunities available upon successful completion of the test. Additionally, the overall apprenticeship recruiting and publicity campaign shall include a component limited toward advanced apprentices. These campaigns may include print and electronic media, dissemination of material to community, government and minority organizations. The City of New York may provide space and opportunities for such publicity.

39. By April 1977, Local 28 and JAC shall provide to the Administrator and the other parties a written plan of an effective general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Apprentice Program as provided in the Order and Judgement and this Revised Program. The other parties shall have 30 days to

comment upon the written plan and Administrator, having considered all submissions, shall revise the plan if he deems necessary and shall order it into effect by May 1, 1977.

Work Referral

40. The Administrator shall conduct a study of the present Local 28 work referral system as described in the written statement submitted pursuant to Paragraph 21(g) of the Order and Judgment. This study shall be completed by April 1, 1977 and the Administrator shall submit to the parties such recommendations he deems necessary to assure that non-whites do not bear a disproportionate share of unemployment.

Resolution of Disputes

41. a) The Administrator shall hear and determine all complaints concerning the operation of the Order and Judgment and this Revised Program and shall decide any questions of interpretation and claims of violations of the Order and Judgment and the Revised Program, acting either on his own initiative or at the request of any party herein or any interested person. All decisions of the Administrator shall be in writing and shall be appealable to the Court.

b) Any party or any individual affected by this Revised Program may make a complaint to the Administrator within thirty days after the situation complained of arises. The Administrator shall give the parties notice of such a complaint within five days and, where a hearing is in his discretion warranted, expeditiously schedule such hearing.

General Provisions

42. Local 28 and the JAC shall post conspicuous notices, in language and at locations approved by the Administrator, advising individuals of their rights under this Revised Program within 60 days after the Revised Program is approved by the Court.

43. Nothing contained in the Revised Program should be construed as preventing the Executive Board from adopting portions of the Revised Program for the benefit of whites and

other minorities provided that such plans do not interfere with the operation of this Revised Program.

44. Except as modified, changed or amended by the terms of this Revised Program or order of the Administrator, Local 28 and JAC shall not change, modify or amend any aspect of the operation or content of the Apprentice Program, or the conditions or terms upon which an individual shall become a member of the Apprentice Program of Local 28 or entitled to work within the jurisdiction of Local 28.

45. At any time, any of the parties herein may apply to the Administrator and then to the Court for the purpose of seeking additional orders to insure the full and effective implementation of the terms and intent of this Revised Program.

Dated: New York, New York,
December 30, 1976

.....
DAVID RAFF, ESQ.
Administrator

SO ORDERED:

...../s/.....

U.S.D.J.

Dated:

APPENDIX A

New York State Division of Employment
(Department of Labor)
Department of Employment of the City of
New York

Bureau of Labor Services of the City of New York
 Recruitment and Training Program, Inc.
 Fight Back
 Asian Americans for Equal Employment
 Black Economic Survival
 Regional Neighborhood Manpower Services
 Centers of New York City
 New York City Board of Education (Public High School and Evening Trade Division)
 Williamsburg Coalition
 New York Urban League
 National Association for the Advancement of Colored People
 Puerto Rican Community Development Project
 National Association for Puerto Rican Civil Rights
 Citywide Coalition of Black, Hispanic, and Asians in Construction
 New York Project Equality
 Commonwealth of Puerto Rico
 Opportunities Industrialization Center of New York, Inc.
 Bedford-Stuyvesant Restoration Corp.
 New York City Human Rights Commission*
 New York State Division of Human Rights

* Send notices of exams, but no bulk application.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
the City of New York,

Plaintiffs-Appellees,

v.

LOCAL 638 ... LOCAL 28 of the SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION and Local 28 Joint Apprenticeship Committee,

Defendants-Appellants,

Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

Nos. 464, 465, Dockets 75-6079, 75-6093.

United States Court of Appeals,
Second Circuit.

Argued Dec. 4, 1975.
Decided March 8, 1976.

The District Court for the Southern District of New York, Henry F. Werker, J., 401 F.Supp. 467, granted affirmative relief against union and apprenticeship committee under Civil Rights Act of 1964 to remedy racially discriminatory employment practices, and union and apprenticeship committee appealed. The Court of Appeals, J. Joseph Smith, Circuit Judge, held that evidence was sufficient to support finding that union and apprenticeship committee had engaged in racially discriminatory employment practices in violation of the Civil Rights Act of 1964, that appointment of administrator with broad powers over union and apprenticeship committee was appropriate, that order requiring replacement of one of three apprenticeship committee representatives was not warranted, that order requiring union and apprenticeship committee to attain by 1981 a combined membership in the union and apprenticeship program composed of 29 percent of persons of minority descent was warranted, and that back pay award would be modified to allow individuals to prove by means of testimonial evidence that they were unlawfully excluded from union and apprenticeship program in order to attain back pay award. A majority of the court was also of the opinion that order would be modified so that acceptance into training program would be based on test results alone and not on white-minority ratio.

Modified and, as modified, affirmed.

Feinberg, Circuit Judge, filed a concurring opinion.

Sol Bogen, New York City, for Sheet Metal Workers Intern. Ass'n, Local 28 and Union Trustees of Local 28, Joint Apprenticeship Committee.

Louis G. Corsi, Asst. U. S. Atty., New York City (Thomas J. Cahill, U. S. Atty., for the Southern District of New York, Taggart D. Adams and Steven J. Glassman, Asst. U. S. Attys., New York City, Abner W. Sibal, Gen. Counsel, EEOC, Joseph T. Eddins, Jr., Associate Gen. Counsel, and Beatrice Rosenberg, Atty., EEOC, Washington, D. C., of counsel), for Equal Employment Opportunity Commission.

Ellen Kramer Sawyer, New York City (W. Bernard Richland, Corp. Counsel of the City of New York, L. Kevin Sheridan, New York City, of counsel), for City of New York.

Before SMITH and FEINBERG, Circuit Judges, and WARD,* District Judge.

J. JOSEPH SMITH, Circuit Judge:

This appeal requires this court to confront, again, one of the most important and difficult questions currently facing the federal judiciary: the nature and scope of permissible remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Local 28 of the Sheet Metal Workers' International Association (hereinafter Local 28) is a union, based in New York City, with about 3,500 members. Of this number, approximately three percent are persons of minority descent.¹ The sheet metal workers who belong to Local 28 fabricate and install ducts and other equipment for ventilating, air-conditioning and heating systems. Local 28 maintains jurisdiction over all five of the City's boroughs and exercises complete control over entry into the sheet metal trade in New York City.

The Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. (hereinafter the Contractors' Association) is a trade organization of builders who do sheet metal construction work. The Contractors' Association has a collective bargaining agreement with Local 28 and the firms which compose the Association normally employ 70-80 percent of the members of Local 28.

The Joint Apprenticeship Committee (hereinafter the JAC) is a body of three representatives from Local 28 and the Contractors' Association which oversees a training program for apprentice sheet metal workers. This program involves four years of

* Robert J. Ward, United States District Judge for the Southern District of New York, sitting by designation.

¹ For the purpose of this opinion, the term "minority" refers primarily to persons who are black or of Spanish-speaking lineage.

classroom and on-the-job training at the end of which time the apprentices normally graduate to journeyman status and full membership in Local 28.

This appeal has its origins in a broad-reaching action initiated by the Justice Department² against several New York City construction unions under Title VII of the 1964 Civil Rights Act. That action charged the defendant unions and their respective apprenticeship programs with instituting and maintaining discriminatory membership policies in violation of federal law. However, the various unions were granted separate trials and, thus, the only defendants-appellants in this appeal are Local 28, the JAC, and the sheet metal Contractors' Association.³

In the proceeding below in the United States District Court for the Southern District of New York, Local 28 and the JAC were found to have violated Title VII's ban on discriminatory employment and membership practices. The court, Henry F. Werker, *Judge*, thereupon ordered a variety of remedial actions, including, *inter alia*, the institution of a court-appointed administrator to oversee Local 28 and the JAC, the payment of back pay to certain victims of past discrimination, the imposition of a remedial racial membership goal upon Local 28 and the replacement of one of the present JAC representatives with a new representative of minority descent.

Local 28 and the JAC appeal from Judge Werker's factual findings as to past discriminatory practices. They also contest the nature of the remedy ordered below. The EEOC and the City of New York seek to uphold the factual findings and the remedial order of the district court except that they seek

² While the Justice Department initiated this action, the Equal Employment Opportunity Commission (EEOC) has been substituted as the named plaintiff agency for the federal government. The City of New York has been granted status as a plaintiff-intervenor.

³ There is no claim here that the Contractors' Association has engaged in discriminatory employment policies. The Association is a party only for the purposes of relief and because, under the standards of Rule 19(a), Fed. R. Civ.P., the Contractors' Association is an indispensable party. Fed. R. Civ.P. 19(a).

modification of Judge Werker's back-pay order so as to expand the class of persons eligible for a back-pay award.

For the reasons outlined below, we modify the district court's order and, as modified, affirm.

I. FACTUAL BACKGROUND

[1] Local 28 and the JAC are no strangers to the courts. In 1964, the New York State Commission for Human Rights, after an administrative hearing, found that Local 28 and the JAC had maintained discriminatory hiring practices in violation of New York law. That finding was specifically affirmed, upon review, by the Supreme Court of New York. *State Commission for Human Rights, v. Farrell*, 43 Misc.2d 958, 252 N.Y.S.2d 649, 652 (Sup.Ct., N.Y. County, 1964). As a result of that judgment, Local 28 and the JAC have been subject to a state judicial decree mandating certain procedures to insure non-discriminatory recruitment and membership practices.

In April and July of 1974, Judge Murray I. Gurfein, sitting in the United States District Court for the Southern District of New York, issued interim orders against Local 28 and the JAC, requiring that certain minority applicants be accepted into the sheet metal apprenticeship program. Finally, Judge Henry F. Werker, after a three-week trial beginning in January of 1975, found that Local 28 and the JAC had violated Title VII. It is the findings and remedies of this last proceeding which are presently on appeal.

Local 28 and the JAC argue here that there was insufficient evidence to support Judge Werker's findings. We disagree.

The provisions of Title VII relevant here make it unlawful for a labor union, such as Local 28, "to discriminate against, any individual because of his race ... or national origin," to refuse "applicants for membership ... because of such individual's race ... or national origin," and to "cause an employer," such as the members of the Contractor's Association, "to discriminate against an individual" on account of race or national origin. 42 USC § 2000e-2(c).

In addition, Title VII forbids a labor union or apprenticeship committee, such as the JAC, from discriminating "against any individual because of his race ... or national origin." 42 U.S.C. § 2000e-2(d).

In the record before Judge Werker, there was ample evidence to find that Local 28 and the JAC had violated these statutory provisions.

There are four means by which an individual can be admitted to membership in Local 28. The majority of Local 28 members are admitted upon graduation from the apprenticeship program administered by the JAC. In addition, persons in allied, "sister" unions in the construction industry may be allowed to transfer directly into Local 28, without prior training in the apprenticeship program. There is a third route onto the Local 28 membership rolls by which an individual may take a battery of journeyman-level tests, without formal apprentice training or membership in an allied union, and upon passage of these examinations, the individual is certified as a journeyman and admitted to Local 28. Finally, sheet metal workers in nonunion shops become members of Local 28 if Local 28 subsequently organizes their shop, and if their employer certifies that his workers perform at journeyman standards. Local 28 also issues temporary work permits to individuals who are not permanent members of the union of sheet metal workers.

There is ample evidence that all the routes into Local 28 have been blocked to minority group members as a result of discriminatory practices by Local 28 and the JAC. The trial record in this case is voluminous and the facts before the district court were more than adequate to sustain its findings. We describe some of these facts briefly to indicate the consideration behind our decision that, as Judge Werker found, Local 28 and the JAC have consistently and egregiously violated Title VII.

Entrance into the apprenticeship program is gained by passing certain written and manual tests and by possession of a high school diploma. The evidence is clear that these requirements

disqualify blacks and Spanish-speaking applicants to a far greater extent than they disqualify non-minority applicants to the apprenticeship program.

Under *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), job requirements which disqualify minority group members to a significantly greater extent than they disqualify whites violate Title VII unless it can be demonstrated that the requirements are "job-related." See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 677 (1973); *Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973). This burden of proof Local 28 and the JAC have failed to meet.

To sustain their burden of proving job-relatedness, Local 28 and the JAC relied upon the expert testimony of an industrial psychologist, Dr. Judah Gottesman of the Stevens Institute of Technology. However, Dr. Gottesman's testimony was, at best, equivocal in its implications and was clearly insufficient to sustain the union's claim of job-relatedness.

Dr. Gottesman indicated that, for technical reasons primarily related to sample size, it was impossible to determine whether or not the entrance exams used for admission to the apprenticeship program bear any relation to on-the-job abilities at the end of the training program. Indeed, Dr. Gottesman, responding to the dearth of evidence as to the job-relatedness of these entrance examinations, had suggested that most of the tests in

* There is language in *Griggs* which might be interpreted to indicate that job-relatedness is not required of employment and entrance criteria if there is no intent to discriminate and if there is no history of past discrimination. However, we need not address that issue here since the decision of the New York Supreme Court in *State Commission for Human Rights v. Farrell*, *supra*, found that Local 28 and the JAC had maintained discriminatory employment and membership practices. Since the issue of past discrimination may be *res judicata* and is certainly established to our satisfaction, we need not decide if *Griggs* would require job-relatedness in the absence of such prior discrimination.

use be abandoned and others added in their place. This the JAC and Local 28 have declined to do.

Moreover, even if the tests used for entrance into the apprenticeship program were found to be job-related, other aspects of Local 28's behavior would sustain a finding of discrimination in the operation of the apprenticeship program. The 1964 New York state court decision, *State Commission for Human Rights, v. Farrell, supra*, dwelt heavily upon admissions into the apprenticeship program and required the use of objective admissions tests rather than the nepotistic criteria for admissions to apprenticeship in use until then. Local 28 responded to this order by establishing, with union funds, "cram courses" for the sons and nephews of present union members in order to prepare them for the entrance tests. This was contrary to the spirit and letter of the New York court's order.

Of course, a cram course available to all applicants would be a different matter. But the decision to use union funds to help sons and nephews circumvent the objective tests required by the court evinces bad faith on the part of Local 28.

The evidence with respect to the other means of union admission reveals a pattern of more blatant discrimination.

Despite intense pressure from its International Association, Local 28 has historically refused to organize the blowpipe industry in the New York area. The blowpipe work force which Local 28 has refused to organize is predominantly of minority descent and, according to the testimony of one contractor, it is "common knowledge" in the industry that Local 28's attitude towards the blowpipe workers is a result of their racial make-up. Eventually, the International Association had to organize these workers separately since Local 28 refused to do so.

There is thus a separate union in New York City predominantly composed of minority group blowpipe workers. This group has been kept at arm's length by Local 28 notwithstanding their membership in the same International.

Local 28 has consistently accepted white transferees from allied construction unions while denying transfer to blacks with equivalent qualifications. In particular, black blowpipe workers have been denied transfer into Local 28 while white workers from the same union have been allowed in. This constitutes a particularly blatant form of discrimination since many of these minority blowpipe workers are entitled to transfer into Local 28 as a matter of right under the constitution of the International Association to which Local 28 belongs.

Local 28 has also issued temporary work permits to white members of allied construction unions, some from areas far removed from New York City, while denying such work permits to minority group sheet metal workers who already reside in the New York City area.

Local 28's performance record to date would be even worse had it not been for the rather minor concessions it has grudgingly made under court order. Indeed, compliance with Judge Gurfein's interim order was delayed for a considerable period and eventual compliance occurred only under heavy pressure.

This brief sample of the evidence against Local 28 and the JAC is sufficient to indicate that Judge Werker's findings of Title VII violations were not "clearly erroneous." Rule 52(a), Fed.R.Civ.P. Indeed, the brief submitted to this court by Local 28 and the JAC does not even make a serious effort to contest the finding of Title VII violations. The real issue before this court is the nature of the remedies in a case such as this. It is to the legal background of this issue that we now turn.

II. LEGAL BACKGROUND

A. Reverse Discrimination and Effective Enforcement of Title VII

The underlying considerations behind an order such as that on appeal are easy to state, if difficult to reconcile. When dealing with recalcitrant unions which have defied gentler means of

enforcement, a mathematical membership goal may be viewed as the only effective means to eradicate discriminatory practices and to remedy the effects of past discrimination. On the other hand, the use of such membership goals means, in practice, that certain nonminority persons will be kept out of the defendant union solely on account of their race or ethnic background. Such "reverse discrimination" contradicts our basic assumption that individuals are to be judged as individuals, not as members of particular racial groups.

The tension between these two policy considerations is demonstrated by certain facially-contradictory provisions of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(j) specifically prohibits "preferential treatment" in hiring practices to correct racial "imbalance." As Judge Hays demonstrated in his dissent in *Rios v. Enterprise Association Steam Fitters Local 638 of U. A.*, 501 F.2d 622 (2d Cir. 1974), (a dissent Judge Feinberg later characterized as "powerful," *Patterson v. Newspaper & Mail Deliverers' Union of New York and Vicinity*, 514 F.2d 767, 776 (2d Cir. 1975)), there are strong indications that many of the congressmen who supported § 2000e-2(j) thought they were prohibiting the use of numerical goals such as that ordered by Judge Werker in the proceeding below.

On the other hand, 42 U.S.C. § 2000e-5(g) specifically gives authority to the district courts to order any "affirmative action" which "may be appropriate" to remedy past discrimination. Section 2000e-5(g) expressly states that the scope of the district courts' remedies for employment violations is to be "equitable," which is to say, broadly discretionary.

The tension between the needs of effective enforcement and the avoidance of reverse discrimination is further manifested in the opinions of this court. The *Rios* decision, *supra*, affirming union membership goals for minority workers, was made by a sharply divided panel. Those panels which have imposed membership goals have done so with great reluctance, stressing the temporary nature of the goals and the egregiousness of the behavior being corrected. See, e. g., *Bridgeport Guardians*, *infra* at 1340.

Notwithstanding such reservations, minority membership goals have been condoned on specific occasions as "appropriate" exercises of equitable powers.

One of the most recent Second Circuit panels to confront the problem of Title VII remedies involved the case of *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975). The *Kirkland* court promulgated a two-fold test for the imposition of temporary quotas. There must first be a "clear-cut pattern of long-continued and egregious racial discrimination." Second, the effect of reverse discrimination must not be "identifiable," that is to say, concentrated upon a relatively small, ascertainable group of non-minority persons.

Thus, in *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), this court upheld temporary employment goals for use in the selection of new patrolmen for the Bridgeport, Connecticut police force. However, the use of racial goals for promotions above the rank of patrolman was rejected. The court's decision in this instance presaged the logic of the *Kirkland* panel. Minority goals were not appropriate for promotion in the ranks above patrolman (1) because there was inadequate evidence of discrimination in the upper ranks and (2) because

the imposition of quotas will obviously discriminate against those whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes.

Bridgeport Guardians, *supra* at 1341.

While some whites were to be kept off the Bridgeport police force as a result of the entry level quota for patrolmen, that group of individuals could not be identified with certainty and hence there were no ascertainable victims of reverse discrimination. However, the white officers who were already on the force

were a different matter: they were an easily identifiable group for whom the hardship of reverse discrimination was direct, obvious and personal.

Similarly, the *Rios* panel, which, by a divided vote sanctioned temporary employment goals, analyzed the situation before it in terms essentially the same as those used in *Kirkland*. In particular, the *Rios* situation was distinguished from the facts of *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct., 1704, 40 L.Ed.2d 164 (1974), on two grounds. First, in *Rios* there was substantial evidence of purposive "past discrimination" (as opposed to a mere racial "imbalance" of non-discriminatory origins). Second, the defendant union in *Rios* was capable of expanding its total membership so as to dilute the impact of the remedy upon non-minority persons. In *DeFunis*, in contrast, the fixed number of law school spaces concentrated the impact of reverse discrimination upon a small and narrow group of persons, i. e., the applicants next in line on the University of Washington's "waiting list" for law school admissions. *Rios*, *supra* at 630, n. 6.

[2] Finally, in *Kirkland*, the court explicitly adopted a formula which my brothers find controlling in the instant case: the imposition of racial goals is to be tolerated only when past discrimination has been clear-cut and the effects of "reverse discrimination" will be diffused among an unidentifiable group of unknown, potential applicants rather than upon an ascertainable group of easily identifiable persons. In the court's words:

The smaller [the] group participating in a civil service examination, the more pointed the problem [of reverse discrimination] becomes. We can no longer speak in general terms of statistics and class groupings. We must address ourselves to individual rights.

A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court

know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed for advancement solely because they are white.

Kirkland, *supra* at 429.

B. Merit System and Job-Relatedness

[3] Just as Title VII evinces a desire to avoid the identifiable forms of reverse discrimination, it also indicates a congressional intent to protect bona fide, nondiscriminatory "professionally developed ability test[s]." 42 U.S.C. § 2000e-2(h). The authoritative construction of this provision in earlier cases makes a more extended discussion unnecessary at this date. *Griggs*, *supra*; *Bridgeport Guardians*, *supra*; *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972). Suffice it to say that a job requirement which falls with disproportionate effect upon minority-group applicants must be justified by proof of "job-relatedness." While it is not always clear what quantum of evidence is required to establish job-relatedness, see *Albermarle*, *supra*, 422 U.S. at 423, 449, 95 S.Ct. at 2374, 2387, 45 L.Ed.2d at 299, 316 separate opinion of Chief Justice Burger) (separate opinion of Chief Justice Blackmun), it is clear that, once such job-relatedness is proven, a test or job requirement is immunized from attack under Title VII.

With these legal standards identified, we turn to the task of applying them to the order of the district court.

III. THE DISTRICT COURT'S ORDER

Judge Werker's order may be reviewed as consisting of six major provisions. First, a court-appointed administrator is granted extensive supervisory power over Local 28 and the JAC. The administrator is to develop and enforce more detailed plans for achieving the goals outlined in broad terms by Judge Werker's decree.

Second, Local 28 and the JAC are enjoined from all future violations of Title VII.

Third, one of the present union representatives to the JAC is to be replaced by a representative of minority descent. This is done, apparently, to ensure an internal means of enforcing compliance with Title VII.

Fourth, Local 28 and the JAC are required to attain, by 1981, a combined membership in the union and apprenticeship program which is composed of 29 percent of persons of minority descent. Interim membership goals are to be agreed upon by the parties and enforced by the court-appointed administrator.

Fifth, Local 28 is to offer at least once a year a non-discriminatory test for journeymen and for entrance into the apprenticeship program and is to allow transfers and issue temporary work permits on a nondiscriminatory basis. Local 28 and the JAC are to engage in extensive recruitment and publicity campaigns in minority neighborhoods in order to ensure a broad applicant pool for these tests and transfers.

Sixth, back pay is to be awarded to persons who applied to and were rejected by Local 28 on account of race or national origin and who can offer documentary evidence of such discriminatory rejection.

[4] The appointment of an administrator with broad powers over Local 28 and the JAC is clearly appropriate under the circumstances here. While union self-government is desirable and is, indeed, an ideal to which the law aspires, 29 U.S.C. § 401, our interest in union self government cannot immunize Local 28 from the consequences of its actions. The apparent failure of the New York court order to change Local 28's membership practices to an appreciable extent and the rather reluctant response made by Local 28 to Judge Gurfein's orders convince us that it is necessary for a court-appointed administrator to exercise day-to-day oversight of the union's affairs.

The abridgement of self-government implied by this action will, hopefully, prove to be temporary. Moreover, the need for such strict enforcement seems thoroughly justified by the union's past recalcitrance and by the requirements of Title VII.

[5] We similarly believe that it is appropriate to enjoin the defendants in this litigation from repeating their past discriminatory practices. Certainly, the record of Local 28 and the JAC provides a reasonable basis for inferring that future violations of Title VII might occur in the absence of such an injunction.

[6] While we agree that the record here amply demonstrates the need for a court-appointed administrator and for an injunction against the defendants, we do not approve of the district court's decision to require replacement of one of the JAC representatives. Such an action seems superfluous in light of the broad supervisory powers granted to the administrator who, for purposes of compliance with Title VII, will serve as the superior of the JAC representatives. Any recalcitrance on the part of the JAC representatives may be overcome by the exercise of the administrator's authority.

Moreover, this part of the district court's order cannot be justified under the "non-identifiability" test adopted by this court in *Kirkland*. The district court's order with respect to the appointment of a minority-group JAC representative is, in effect, a quota mandating that one-third of the JAC's membership be of minority descent. This is, moreover, a quota which must be met by replacing (or, in the parlance of the trade, by "bumping") a white incumbent from the JAC. This is forbidden by Title VII and the law of this circuit.

The *Kirkland* court held that the imposition of a racial goal can be justified only when two conditions are met: there must be a long and egregious pattern of past discrimination and the effects of the goal cannot fall upon a relatively small, identifiable group of reverse discriminatees. While the requirements with respect to past practices are amply met in this situation, the order requiring the replacement of a white JAC representative fails under the second standard of "non-identifiability."

In this instance, the impact of the racial goal would be direct, immediate and obvious: one of the two JAC representatives of

the Union must be "bumped." This is the type of narrowly-focused, ascertainable reverse discrimination which *Kirkland* and its predecessors forbid and, accordingly, we reverse that part of the district court's order requiring replacement of an incumbent JAC representative.

[7] While we disapprove of a membership goal for the JAC, we affirm the use of such a goal with respect to overall membership in Local 28 and the apprenticeship program. As this court noted in *Kirkland and Bridgeport Guardians, Inc., supra*, an entry-level quota has a more diffuse and amorphous effect upon reverse discriminatees than a quota used to bump incumbents or hinder promotion of present members of the work force. An entry-level goal has less ascertainable effect since we cannot readily determine who it is that is being kept out. Accordingly, entry-level goals have less identifiable impact upon reverse discriminatees and are therefore less objectionable as temporary remedies.

Since the first part of the *Kirkland* test, a long and persistent pattern of discrimination, is amply supported by the record, we approve the 29 percent overall membership goal established by Judge Werker.

[8] The district court's order also requires that a non-discriminatory examination, validated under EEOC guidelines, be given at least annually for entrance into the apprenticeship program and for direct admission at the journeyman level. It is the very specific teaching of *Griggs and Albemarle* that examinations, when used by employers and unions, must be job-related. Thus, to the extent that the order requires future tests administered by Local 28 and the JAC to be validly job-related, the order is clearly mandated by the decisions of the Supreme Court.

However, Judge Werker's order goes beyond the mere requirement that tests, when given, be job-related. The order on appeal also mandates that apprenticeship and journeyman tests must be administered at least once a year and that extensive recruitment of minority candidates must precede these tests.

We approve this part of the order as an appropriate exercise of the district court's equitable discretion. It would obviously be possible to circumvent the requirement of job-related tests by administering no tests at all. Moreover, a decision to refrain from giving journeyman and apprenticeship tests or to restrict candidate recruitment could effectively freeze the union's membership in its present racial composition. This is the difficulty which Judge Werker has sought to avoid by requiring annual testing and publicity, and we affirm for the reasons which gave rise to his order in the first instance.

[9] However, we modify the district court's order in one respect. At oral argument, it was established that, pursuant to the order now on appeal, the parties to this litigation and the court-appointed administrator have chosen to implement the decision of the district court by establishing a ratio of white to minority acceptances into the apprenticeship program. This ratio is to be maintained even if it requires accepting a minority applicant with a lower score than a white applicant.⁵

My colleagues feel that this is unacceptable under *Griggs*, *Kirkland* and Title VII as we interpret them above. They consider that the import of those authorities is that the results of job-related tests are to be honored since they are genuinely neutral in intent and effect, i. e., they make ability to perform

⁵ Subsequent to the oral argument in this appeal, EEOC and the City of New York advised this court that the apprenticeship ratios under discussion are embodied in an agreement negotiated by the parties which the district court approved on November 13, 1975. Appeal is now pending from an order setting a temporary 3 minority: 2 white apprentice admission rate. Meanwhile, the parties have agreed to the admission to the class entering in February, 1976, of 66 individuals, 33 minority and 33 white, each of whom would have been admitted whether the ratio was applied or not. (Additional minority members would have been admitted if the ratio were applied.) Nevertheless, we find it incumbent to address this issue now since the ratios in question are adopted pursuant to the order now under appeal, and we feel it is appropriate and indeed necessary for us to clarify what this order does (and does not) permit.

the sole criterion for selection. They hold that it is inconsistent with this policy to administer admittedly neutral, non-discriminatory tests (approved by the EEOC) and then set those results aside because of the racial make-up of the applicants who pass.

They hold that *Griggs* and 42 U.S.C. § 2000e-2(h) require that test results be respected whenever those tests are validly job-related.

The writer disagrees with the majority of the panel on this point, essentially for the reasons set forth by Judge Mansfield dissenting from the denial of *en banc* in *Kirkland v. New York State Department of Correctional Services*, 531 F.2d 5 (2d Cir. 1975), and would approve the application of the temporary quota to the entrants to the apprenticeship program, presently set at 3 to 2, minority to majority applicants, as affirmative action under 42 U.S.C. § 2000e-5(g) appropriate to remedy past discrimination.

This apprenticeship program presents an entry-level situation parallel to that of *Bridgeport Guardians*. It is true that the relatively small number of openings makes those subject to reverse discrimination fairly easily identifiable. This was, however, true in *Bridgeport Guardians* and is necessary to correct the illegally established racial makeup of the present membership. *United States v. Wood, Wire & Metal Lathers*, 471 F.2d 408, 413 (2d Cir. 1973); *Rios v. Enterprise Association Steamfitters Local 638 of U.A.*, 501 F.2d 622, 629 (2d Cir. 1974). Cf. *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 2d Cir. 1975). The plan adopted here does not entail the discharge or demotion of majority members already in place, as did the plan disapproved in *Chance v. Board of Education*, 534 F.2d 993 (2d Cir. 1976). It does reduce the appointment opportunities of new majority applicants temporarily until the past illegal discrimination has been remedied.

The membership of the local constitutes the pool of qualified persons who are able to compete for available jobs in the

Metropolitan area. Minorities have effectively and illegally been excluded from that pool. The apprenticeship program is one of the best available means of correcting within a reasonable time the situation in the industry by erasing the effects of the illegal practices. It involves in a sense reverse discrimination. However, it is positive remedial action not solely to achieve racial balance, but to remove the illegally created imbalance in the industry labor pool. I would approve the court's determination on the apprenticeship program, including the present temporary 3 to 2 ratio. My colleagues, however, consider that the court has exercised its full remedial authority in a case such as this when an acceptable examination is used, even at an entry level and that the application of racial quotas to the lists of those successful in such an exam is forbidden reverse discrimination.

We accordingly modify the order insofar as it might be interpreted to permit white-minority ratios for the apprenticeship program after the adoption of valid, job-related entrance tests. Acceptance into the training program must be based on tests results alone.

Our decision, of course, makes it particularly important that the recruitment of qualified minority test candidates be thorough and vigorous. We believe that the court-appointed administrator has ample authority to assure that result.

We also recognize that, as a result of this decision, a heavy burden may be placed upon direct qualification and admission and transfer from allied unions as the means of reaching the 29 percent membership goal. This, however, seems most appropriate under the circumstances. The persons who are presently eligible for transfer into Local 28 are the persons who have felt the brunt of the union's past discriminatory practices. They are largely older individuals who have been denied entry into Local 28 in the past or who have been forced into essentially segregated unions as a result of Local 28's practices.

[10] Finally, we modify Judge Werker's back-pay order so as to allow individuals to prove by means of testimonial evidence

that they were unlawfully excluded from Local 28 and the apprenticeship program. Judge Werker has limited back-pay awards to those who could provide documentary proof of application and rejection. He justified this limitation on the ground that applicants with only testimonial evidence had too "speculative" a claim for the court to entertain.

[11] We think that *Albemarle, supra*, compels a different result. The Supreme Court has made clear that back pay is to be the rule rather than exception under Title VII and that back pay is to be awarded whenever possible so as to deter Title VII violations and so as to "make whole" the victims of past discrimination. In the Court's words:

[G]iven a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

Albemarle, supra 422 U.S. at 421, 95 S.Ct. at 2373, 45 L.Ed.2d at 298.

In the instant setting, a denial of back pay to those persons who possess only testimonial evidence of their application and rejection would serve to "frustrate the central statutory purposes" of Title VII. One of the reasons that applicants may have no documentary proof of discrimination against them is that Local 28 and the JAC have kept incomplete records of their admission practices. To deny back pay to persons who, as a result of the union's actions, have no written proof is to reward the union and the JAC for their record-keeping failures.

Beyond that consideration, back pay should be given as broadly as possible in order to effectuate the dual policies of remediation and deterrence. There is a class of individuals whose claims are too speculative for adjudication: those with neither written nor testimonial evidence of application and rejection. Thus, those who never applied to Local 28 or the JAC because of their

well-deserved reputation for discrimination are, regrettably, ineligible for back pay. But those who did apply and who can prove discrimination by written or testimonial evidence are entitled to back pay.*

In summary, we modify the district court's order to eliminate the requirement that a white JAC representative be replaced by a representative of minority descent, to forbid minority-white admission ratios to the apprenticeship program once valid job-related tests have been adopted, and to extend back pay to persons who can prove by testimonial evidence that they applied to and were rejected by Local 28 and the JAC for unlawful reasons.

So modified, the order is affirmed.

FEINBERG, Circuit Judge (concurring):

Because Judge Smith's opinion accurately tracks the law of this circuit as it now stands, I concur in the result we are required to reach. However, I believe it appropriate to set forth the following views.

* We are aware that in our recent decision in *Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976), we indicated that retroactive or constructive seniority could be granted to female police officers who could prove that they had been deterred from applying for jobs in the police department because of its discriminatory practices, relief arguably broader than that granted here. However, the remedy in *Acha* was retroactive seniority, far less drastic for a defendant to be required to bear than back pay. Moreover, the retroactive seniority in *Acha* was, by the nature of plaintiffs' class, limited to those who were subsequently hired after the defendants had ceased discriminating. The relief of back pay granted here is not so limited so that the number of potential claimants, and the potential burden on defendants, is much greater. The fact that the *Acha* plaintiffs all eventually did seek employment as police officers when that job was finally opened to women also makes it more likely that they may indeed have been deterred from applying only by the defendants' discrimination. Finally, the discrimination in *Acha* was an official limitation of certain job categories to males, while in this case the discriminatory practices complained of were covert. Limitation of relief in *Acha* to those who actually did apply in those circumstances would have been far harsher than such a limitation here, where the alleged deterrence stemmed not from an officially announced discriminatory policy but from rumors of unfairness.

Judge Smith correctly describes the holding of *Kirkland v. New York State Dep't of Correction Servs.*, 520 F.2d 420 (2d Cir. 1975), as allowing temporary quotas as a remedial measure only when there has been a "clear-cut pattern of long-continued and egregious racial discrimination," 520 F.2d at 427, and the reverse discrimination is not concentrated on a relatively small, identifiable group. Appellees in *Kirkland* sought rehearing en banc, which was denied with three active judges dissenting and expressing the view that *Kirkland* conflicted with prior decisions of this court. At 5, 10 (2d Cir. 1975). Nevertheless in *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), the majority, Judge Oakes dissenting, relied upon *Kirkland* in setting aside a quota.

Since the issue of the legality of quotas is bound to recur and the court seems badly divided, and since Judge Smith has set forth his views on that issue, it may be useful for me to discuss it briefly. In *Patterson v. Newspaper & Mail Deliverers Union of N.Y. & Vicinity*, 514 F.2d 767, 775 (2d Cir. 1975) (concurring opinion), I expressed doubts regarding the legality of racial quotas. Although the opinion in *Kirkland* cites that concurrence with approval, 520 F.2d at 427, n. 22, it nevertheless seems to me — even at the risk of appearing ungracious — that the test laid down in *Kirkland* is itself open to question. The dissenting opinion of Judge Hays in *Rios v. Steamfitters Local 638*, 501 F.2d 622, 634 (2d Cir. 1974), strongly disapproved of racial quotas, relying on the legislative intention expressed in section 703(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j). The opinion in *Kirkland* also cites Judge Hays's dissent with approval, 520 F.2d at 427, n.22, but allows the continued use of racial quotas, albeit under sharply limited circumstances; the opinion does not discuss the effect of section 703(j), probably because the parties ignored it. I respectfully suggest that the effect of that section, which is reproduced in the margin, cannot be ignored.¹

¹ Section 703(j) provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management

Since we disapprove the racial quota here, it is not now necessary for me to explore the issue at greater length. I emphasize, however, that the disapproval of racial quotas expressed in section 703(j) does not prevent the granting of broad relief to effectuate Title VII's purpose of correcting racial injustice. Focusing on individuals rather than on groups in granting relief, as by providing an immediate remedy to identifiable plaintiffs who were themselves discriminatorily denied jobs, can accomplish much without resort to quotas. Cf. *Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976). The remedy would go to all who fell into this category and would be based, not upon a percentage or quota perhaps forbidden by section 703(j), but upon proof of individual discrimination. Indeed, Judge Smith's opinion in this case utilizes this concept in approving a back-pay award to those who had applied to Local 28 and JAC and had been rejected for racial reasons. See also *Acha v. Beame*, supra. However, since *Kirkland* presently controls and since I agree with the result reached here, further discussion of the problem is not now necessary.

committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
the City of New York,

Plaintiffs,

v.

LOCAL 638 et al.,

Defendants,

LOCAL 28,

Third-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

No. 71 Civ. 2877 (HFW).

United States District Court,
S.D. New York

Nov. 25, 1975.

Civil Rights Act suit was brought against labor union and its apprenticeship committee charging them with discrimination in admission and employment of nonwhites. The District Court, 401 F.Supp. 467, ordered union to adopt a program to achieve a nonwhite membership percentage of 29% by July 1,

1981. An affirmative action program was submitted and objections were voiced thereto. The District Court, Werker, J., held that adoption of interim goals was appropriate, that inclusion of pensioners in measuring total membership was proper, that those claiming one year or more experience were not exempt from aptitude test, that maximum examination fee of \$25 would be adopted provisionally, that installment payment of initiation fee was to be related to income rather than time, that successful applicants for apprenticeship programs were to bear one-half the cost of required physical examination and that a preexamination study group program was to be conducted to familiarize applicants with the type of test to which they would be exposed.

Order accordingly.

Judgment modified, 2 Cir., 532 F.2d 821.

Paul J. Curran, U.S. Atty., S.D.N.Y. by Taggart D. Adams, Louis G. Corsi, New York City, for plaintiff U.S. equal Opportunity Commission.

W. Bernard Richland, New York City Corp. Counsel by Beverly Gross and Thomas A. Trimboli, New York City, for plaintiff City of New York.

Sol Bogen, New York City, for defendant Local 28.

Rosenthal & Goldhaber by William Rothberg, Brooklyn, N.Y., for defendant Joint Apprenticeship Committee and Trust.

Louis J. Lefkowitz, Atty. Gen. of N.Y. by Dominic Tuminaro, New York City, for third and fourth-party defendant New York State Div. of Human Rights.

AFFIRMATIVE ACTION PROGRAM

Introduction

1. This Affirmative Action Program ("Program") is adopted pursuant to the Decision and Order dated July 18, 1975 and

the Order and Judgment dated August 28, 1975 and entered in this action on September 2, 1975 ("Order and Judgment"). The goal of this Program is to assure that the nonwhite¹ membership in Local Union No. 28 of the Sheet Metal Workers' International Association ("Local 28") reaches a minimum level of 29% by July 1, 1981; to assure that substantial and regular progress is made toward this goal in each year prior to 1981; and to assure that non-white members of Local 28 and nonwhite apprentices of Local 28 share equitably in all employment opportunities afforded to members of Local 28.

2. For the purpose of reaching the above goal of 29% by July 1, 1981 this Program establishes as interim percentage goals for the non-white membership of Local 28 the following:

July 1, 1976	10%
July 1, 1977	13%
July 1, 1978	16%
July 1, 1979	20%
July 1, 1980	24%

Each of the above percentages shall be measured against the total membership of Local 28 as of each interim goal date respectively and the final goal date. For the purpose of measurement, total membership shall include all journeyman members, all pensioners² who have been employed as sheetmetal workers within the last three years, and all members or participants in the Local 28 Apprentice Program ("Apprentice Program"). The parties to this action and the Administrator are to implement this Program so that these interim goals may be attained. The administrator shall periodically review the progress toward the attainment of these goals and take such action as he is empowered to take under the Order and Judgment to assure their achievement.

¹ "Non-white" as used in the Program means black and Spanish surnamed individuals.

² "Pensioner" as used in the Program means any individual who receives benefits from the Local 28 pension program.

3. Admission to Journeyman membership in Local 28 shall be attained only through the following procedures:

- a) Successful completion of a 'hands-on' journeyman test administered pursuant to Paragraphs 5-14; or
- b) establishment of proof of the required experience in the sheetmetal trade pursuant to Paragraph 15; or
- c) successful completion of the Local 28 Apprentice Program; or
- d) transfer in accordance with the Sheet Metal Workers' International Union Constitution and Ritual; or
- e) organization of non-union shops.

4. Membership in the Apprentice Program shall be obtained only through the following procedures:

- a) successful completion of an apprentice aptitude test as set forth in Paragraphs 21-32; or
- b) entry with advanced standing as set forth in Paragraphs 33 through 36.

Admission to Journeyman Status

5. Under the supervision and with the approval of the Administrator, Local 28 shall administer a 'hands-on' journeyman's test on October 11, 1975 designed to test fairly and in a non-discriminatory manner the skills needed for a journeyman sheet metal worker. This test and its grading shall be in substance the equivalent of the 'hands-on' portion of journeyman's test given by Local 28 in November, 1969 as revised by a sheetmetal expert provided by the plaintiffs or the New York State Division of Human Rights. Disputes as to any proposed revisions shall be resolved by the Administrator. There shall be a filing fee of \$25 for this test.

6. Local 28 shall undertake a program of publicity and advertising and prepare, make available, and process applications relating to the October 11, 1975 "hands-on" journeyman's test in accordance with the standards and conditions set forth heretofore by the parties and the Administrator. The administration and grading of the test shall be under the overall supervision of the Administrator and shall be accomplished and recorded in such a manner as to facilitate the professional development and validation of future "hands-on" journeyman's tests.

7. Under the following conditions all persons who receive a passing grade in the test described in Paragraphs 5 and 6, and who are physically fit for sheetmetal work shall be eligible for admission to full journeyman membership in Local 28 as follows:

- a) all non-white applicants who receive a passing grade, up to a total of 200 such applicants, shall be admitted to journeyman membership by December 1, 1975 in accordance with and subject to the provisions of Paragraphs 16-18 of the Program. In the event that more than 200 non-white applicants receive a passing grade and elect to exercise their rights to admission to journeyman membership under this Program, the 200 non-whites with the highest grades shall be admitted by December 1, 1975; the remaining non white applicants shall be admitted in accordance with the provisions of sub-paragraph (b) of this paragraph;
- b) white applicants who receive a passing grade shall be placed on a list and ranked in descending order on the basis of their grades on the examination.
- i) white applicants shall be selected for admission in the order of their ranking on the above described list on the basis of a ration to the non-whites admitted pursuant to section (a) of this Paragraph. Said ration shall be agreed upon by the parties, but in no event shall the ratio be less than one non-white for every white. Such ratio shall be designed with the purpose of implementing the interim goals set forth in Paragraph 2. If the parties cannot agree

on a ratio by November 10, 1975 the Administrator shall establish such ratio by November 15, 1975.

- ii) all applicants who receive a passing grade but who are not admitted pursuant to subparagraph (a) or section (i) of subparagraph (b) may be ordered admitted to journeyman membership by the Administrator at a time deemed suitable by him. White applicants who have received a passing grade and who are not admitted by March 1, 1976 shall be eligible for a selection priority over other white applicants qualified by the journeyman's test to be held in the Spring of 1976, or subsequent tests. Non-white applicants who have received a passing grade and who are not admitted pursuant to subparagraph (a) shall be admitted by July 1, 1976, if they so elect.

8. Local 28 shall administer a non-discriminatory, "hands-on" journeyman's test under the overall supervision and approval of the administrator in the Spring of 1976 and at least once a year thereafter. The Administrator after consultation with the parties, may apply to the Court to decrease the frequency of the tests consistent with the requirements of the interim goals set forth in Paragraph 2.

9. The journeyman's "hands-on" tests administered pursuant to Paragraph 8 shall be professionally developed and validated in accordance with EEOC Guidelines. Within a reasonable time before the administration of each test (which shall not be less than four weeks unless good cause is shown), Local 28 shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of the test and (ii) a copy of the test to be administered, provided that counsel for the parties and the Administrator shall not distribute or disclose the contents of the test to any individual or organization except for the purpose of professional validation thereof.

10. All qualified applicants shall be eligible to take the "hands-on" journeyman test specified in this Program. A qualified applicant is defined as follows: any person who

- a) has or will have attained the age of 18 by the date of the test, and
- b) is a citizen or a lawful permanent resident alien legally entitled to work in the United States, and
- c) has resided in New York City or the counties of Westchester (N.Y.) Nassau (N.Y.) Suffolk (N.Y.), Passaic (N.J.) Bergen (N.J.) Hudson (N.J.) Union (N.J.) or Essex (N.J.) for six (6) months prior to the filing of an application, and
- d) has one year of sheet metal work experience including but not limited to employment as a member in any branch of Local 400 of the Sheet Metal Workers International Association, sheet metal experience in the Armed Forces or vocational education or training related to the skills of a journeyman sheet metal worker.

Persons presently registered or recently registered in the Local 28 Apprentice Program or any other recognized apprentice program affiliated with the Sheet Metal Workers' International Association are not eligible.

11. Subject to the approval of the Administrator, Local 28 shall develop a standardized application form for the "hands-on" journeyman's test. Such forms shall include only the following:

- a) provisions for the name, address, telephone number, social security number, citizenship or lawful resident alien status, residency, record of convictions, age, sex and race or ethnic identification of the applicant (with a notation that information regarding race or ethnic identification is required solely for the purpose of compliance with the court order herein and the regulations of the United States Equal Employment Opportunity Commission), and previous sheet metal experience.

- b) information regarding the eligibility requirements, fee, date, time, location, and nature of the "hands-on" journey-man's test.

12. Local 28 shall make available an application form for the "hands-on" journeyman's test and a short description of the nature of the test in the following manner:

- a) at the offices of Local 28;
- b) by mail in response to inquiries and requests made by mail;
- c) in bulk to plaintiffs, City Department of Employment, the New York State Employment Service, Recruitment and Training Program, Inc., Fight Back, and the other governmental or community agencies listed in Appendix A as amended from time to time.

Completed applications for the test shall be accepted by mail or delivery in person at the offices of Local 28. Local 28 may establish, with the approval of the Administrator, a suitable cut-off date for the acceptance of applications. Local 28 may establish a fee for the taking of the "hands-on" journeyman test consistent with the cost of administering such a test. Such fee shall be provisionally, \$25.00. Local 28 may apply to the Administrator for an increase upon good cause shown. Applicants shall be informed, in writing, as to the place of examination with instructions as to how to reach the place and/or a map indicating its location.

13. The "hands-on" journeyman test shall be graded by a Board of Examiners consisting of three members knowledgeable in Sheet Metal. Said Board shall be comprised of a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the Plaintiffs and the State Division of Human Rights. Such Board shall act by majority vote. Said Board of Examiners shall employ the passing grade level developed pursuant to the validation procedures

set forth in Paragraph 9. All applicants shall be advised of their status by first class mail within 30 days of the test. Non-whites who fail the test shall be advised of their possible eligibility for advanced standing in the apprenticeship program.

14. (a) A qualified non-white applicant who passes the test and is physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 within 60 days of the test unless the applicant elects to defer admission pursuant to Paragraph 19.

(b) A qualified white applicant who passes the test and is physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 in accordance with the following procedures:

(i) no later than 30 days prior to the test the parties shall attempt to agree on an appropriate ratio of non-whites to whites to be admitted to journeyman status. This ratio will be established with the purpose of fairly implementing the interim and final goals set forth in Paragraphs 1 and 2 but in no event shall said ratio be less than one non-white for every white. If no agreement is reached by the time specified, the Administrator shall establish the ratio within 15 days thereafter.

(ii) in accordance with the above ratio white applicants shall be admitted on the basis of the highest scores achieved on the "hands-on" journeyman test;

(c) To the best of their ability the parties and the Administrator shall endeavor to set forth on the application form the most accurate estimate of the opportunities available to whites based on the number of preferred candidates pursuant to Paragraph 7(b), the number of expected non-white candidates, and past experience.

15. Commencing January 1, 1976 there shall be established a program for admission to Local 28 journeyman membership of non-whites who have had four years experience obtained in

the United States or elsewhere, in sheet metal work or employment reasonably related or similar to sheet metal work, including experience in the Armed Forces, or vocational training related to the skills of a sheet metal worker. Persons eligible for admission under this program must,

- a) be a resident of New York City, or the counties of Nassau (N.Y.) Suffolk (N.Y.) Westchester (N.Y.), Bergen (N.J.) Passaic (N.J.) Essex (N.J.) Union (N.J.) or Hudson (N.J.) for six (6) months prior to application; and
- b) be age 18 or over; and
- c) be physically fit to perform sheet metal work; and
- d) establish to the satisfaction of a majority of a board of three members knowledgeable in sheet metal work, comprised of a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the plaintiffs and the State Division of Human Rights that the applicant has the requisite sheet metal experience; and
- e) be a citizen or lawful permanent resident alien legally entitled to work in the United States.

The Administrator, after due consultation with all the parties, shall establish procedures for application to this program, for investigation and verification of the criteria set forth in subparagraphs (a) through (e), and for the timing and conditions of admission. Appropriate publicity for the program shall be undertaken at the direction and with the approval of the Administrator.

16. (a) Upon proper application, a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraphs 5 through 15 or Paragraph 35(e) of this Program may request of Local 28's Executive Board that the Local 28 initiation fee be reduced pursuant to the provisions of Paragraph 22(d) of the Order and Judgment. Within 5 days of receipt of such

application, the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator and the parties of the disposition of the application (the notification to the Administrator and the parties shall include the name and address of the applicant). If such application is denied in whole or in part, or is not acted upon within five days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the request in writing after duly considering all the factors set forth in Paragraph 22(d) of the Order and Judgment. In considering such an application the Administrator may require the submission of such information, documents, or other data from either Local 28 or the applicant as he deems necessary.

(b) Upon proper application a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraphs 5 through 15 or Paragraph 35(e) may request of the Local 28 Executive Board that payment of the Local 28 initiation fee commence with employment and be payable on a pro rated basis, each payment not exceeding 10 % of the net check, and payable only during periods of employment until the fee is paid. Within 5 days of the receipt of such application the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator and all parties of the disposition of the application (the notification to the Administrator and the parties shall include the applicant's name and address). If such application is denied in whole or in part or not acted upon within 5 days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the application in writing. The decisions of the Executive Board of Local 28 and the Administrator shall be made having duly considered the financial circumstances of the applicant.

17. (a) At any time after an application pursuant to Paragraph 16 has been pending with the Administrator for more than 5 days a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraph 5 through 15 or Paragraph 35(e) of this Program shall be admitted conditionally

to journeyman membership upon payment of \$56 dollars and one month's dues pending the determination of the Administrator which shall be made within 30 days of the date of the application to the Administrator. During such conditional membership an applicant will be entitled to all the rights and privileges of regular journeyman membership.

(b) If a conditional member is terminated without becoming a regular journeyman member of Local 28 he shall be entitled to a return of any dues paid in advance for any month in which he was not employed and, if he was not employed during his conditional membership, he shall also be entitled to a return of any payment made toward the initiation fee.

18. The granting of any application pursuant to Paragraph 16 shall not diminish any rights or privileges accruing to journeyman membership in Local 28.

19. A person eligible for admission pursuant to Paragraphs 5 through 14 shall be permitted to defer such admission for up to six months from the time he is first entitled to be admitted. During such period, a person who has elected to defer may apply to the Administrator for further deferral of admission for up to another 12 months. If an applicant invokes his right of deferral he shall be admitted, on the same terms and conditions as he was previously entitled, within 30 days of written notice to Local 28 that he seeks to be admitted.

20. Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and pursuant to Paragraph 23(f) of the Order and Judgment.

Apprentice Program

21. The Local 28 Joint Apprenticeship Committee ("JAC") shall maintain an apprentice program of four years duration or less. The terms and conditions of the apprentice program shall be as set forth in the Collective Bargaining Agreement ("Standard Form of Union Agreement between Local ... and Sheet Metal Contractors."), the Local 28 Joint Apprenticeship Trust

and Indenture, and the rules and regulations thereunder except where modified by the Order and Judgment, the provisions of this Program, or order of the Administrator pursuant to his powers under the Order and Judgment.

22. The apprentice program shall indenture no less than 300 apprentices by July 1, 1976 of which no less than 100 apprentices shall be indentured by February 2, 1976. No less than 200 apprentices shall be indentured in each year thereafter up to and including 1981. Said numbers shall include those apprentices admitted with advanced standing. The JAC may indenture apprentices in two separate classes during a year.

23. Apprentices shall be assigned for employment in a ratio of not less than one apprentice for every four journeymen working of the aggregate journeymen employed. Seniority shall not be a criterion for employment, and apprentices shall be rotated for employment where necessary and feasible. The JAC shall make every effort to provide apprentices with classroom instruction, including evenings and Saturdays where necessary, during periods of unemployment, and shall credit such hours toward fulfillment of apprenticeship requirements. The JAC may authorize the accelerated advancement or graduation of any apprentice as it deems proper.

24. Upon successful completion of the Apprenticeship Program, apprentices shall be promptly admitted to full journeyman membership upon payment of the balance due of the initiation fee, if any, which upon application to the Local 28. Executive Board, may be paid on an installment basis for good cause shown, and subject to the procedures contained in Paragraph 16.

25. Applications shall be made available to and accepted from any qualified candidate. A qualified candidate is defined as follows: any person who is deemed physically fit for sheet metal work and who has or will have attained the age of 18 years by the date of indenture of the next scheduled apprentice class and who is not older than 25 years of age (for veterans of active

military duty the age limit is extended one year for each year of such duty up to the age of 30) and for non-whites not over the age of 35 applying for advanced standing, and who is a citizen or permanent resident alien. For the apprentice aptitude test to be administered in November, 1975 only, JAC may require proof of completion of a tenth grade course of education. The JAC shall validate the tenth grade requirement before said requirement may be imposed for subsequent examinations.

26. With the approval of the Administrator, JAC shall develop a standardized application form for the Apprentice Program. The application form shall include information about the date of the next class of apprentices to be indentured, and shall require only the following information of the applicant:

- a) Name, address and telephone number;
- b) Birth date and age;
- c) Social Security number;
- d) Extent of education;
- e) Sex;
- f) Race or ethnic classification; (with a notation that this information is required solely for the purposes of compliance with federal anti-discriminations statutes);
- g) military service;
- h) convictions and pending criminal charges.
- i) Citizenship or lawful permanent resident alien status.

27. Application forms for the Local 28 JAC Apprentice Program shall be available at the offices of the JAC during normal business hours and at the offices of the organizations listed in Appendix A at least 60 days before an examination. Application forms shall be made available by mail upon written request. Completed applications shall be accepted in person or

by mail at the offices of the JAC. There shall be a filing fee of no more than \$15.00. Application forms shall be made freely available to any governmental employment office and minority community organizations not listed in Appendix A upon request. The time for filing applications for a particular apprentice test may be closed by the JAC at a reasonable time (not to exceed three weeks) before the date of the examination.

28. An apprentice aptitude test shall be given on December 13, 1975 and at least once yearly thereafter at a date, time and location approved by the Administrator. The test shall consist of the following professionally developed and validated components: (1) a basic "read and follow directions" test designed to ascertain an applicant's ability to master and understand those written and verbal instructions, directions, and other communications necessary to participate in the Apprentice Program at the first year level; and (2) a mechanical comprehension test similar in substance and scope to that mechanical comprehension test administered by JAC in April 1969. There shall be professionally developed and validated a qualifying score on the "read and follow directions" test designed to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level. The JAC may apply to the Administrator to give a math test as part of the apprentice aptitude test, and such test may be given upon good cause shown. Such math test shall be professionally developed and validated as to content and qualifying score in such manner as to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level.

29. Within three weeks of the administration of an apprentice entrance test, JAC shall provide the Administrator and all parties with:

- (a) the names, race identification, raw scores and rank of all candidates on all tests; and
- (b) the mean and median scores on all tests of all identifiable racial and ethnic groups among the candidates.

30. Persons selected to be indentured as apprentices pursuant to Paragraph 22 shall be selected in accordance with a ratio of non-whites-to-whites which shall be established by agreement of the parties within 30 days prior to the tests, or by the Administrator within 15 days thereafter if the parties fail to agree.³

This ratio will be established with the purpose of fairly implementing the interim and final goals set forth in Paragraphs 1 and 2 but in no event shall said ratio be less than one to one. For the purpose of assuring that white applicants are accorded an opportunity to be accepted in the Apprentice Program in reasonable numbers, the parties and the Administrator shall use their best efforts to assure that the total population of the program shall not exceed 60 non-white individuals, and that an individual term or class shall not exceed 70% non-white individuals.

31. In fulfillment of JAC's and Local 28's obligations under Paragraphs 22 and 30, apprentices chosen means of the apprenticeship entrance test shall be selected from those who meet or exceed the qualifying score on the "read and follow directions" test in the following manner:

- (a) the white apprentices shall be selected on the basis of the highest scores received on the mechanical comprehension test among the white eligible qualified candidates;
- (b) the non-white apprentices shall be selected on the basis of the highest scores received on the mechanical comprehension test among non-white eligible qualified candidates subject to the provisions of paragraph 35.

32. Persons selected for the Apprentice Program may be required to appear for orientation and a physical examination prior to being indentured. The cost of physical examinations are to be borne one half by successful applicants and one half

³ The parties shall agree by November 14, 1975, what the ratio shall be for the classes to be indentured in February and June 1976. If no agreement is reached, the Administrator shall establish the ratio by November 21, 1975.

by the JAC. Additional persons may be invited to orientation and a physical examination by Local 28 JAC if that appears desirable. Persons selected in accordance with the above procedures shall be indentured as apprentices unless such indenturing is waived by them, or they are certified physically unable to perform sheet metal work by medical practitioner licensed in New York State.

Advanced Apprentices

33. There shall be established by the JAC procedures for the admission and advanced placement in the Apprentice Program of non-white apprentices who have experience in sheet metal work or trade education but cannot perform at journeyman level. Applicants for advanced placement shall have at least six months experience in sheet metal work or trade education, be physically fit and shall be not less than 18 years old or more than 35 years old by the date of indenture of the next scheduled apprentice class. For such person applying to be indentured in February and July, 1976 only, the JAC may require proof of completion of a tenth grade course of education by that date. Such requirement must be validated for subsequent utilization.

34. The Training Coordinator of JAC shall evaluate the experience of all applicants for advanced standing and shall make placement to the appropriate grade level. The grade level assigned shall be conditional for a period to be determined by the coordinator, not exceeding three months, based upon classroom work and on the job performance. Applicants who challenge the grade level assigned shall be advised of their right to appeal to the Administrator.

35. a) The Administrator shall determine the number of advanced apprentices to be admitted from the lists resulting from each test, based upon the needs of the apprenticeship program at any given time and the number of applicants eligible for advanced standing as certified by the coordinator.

b) Apprentices who meet the requirements of Paragraph 33 shall be selected for advanced standing in the following manner:

(i) those whose ranking on the apprenticeship aptitude examination qualifies them for acceptance into the apprenticeship program pursuant to Paragraphs 22 and 30 shall be selected in accordance with their ranking and admitted with advanced standing, subject to the number determined by the Administrator pursuant to subdivision (a) of this paragraph.

(ii) if there are insufficient apprentices who qualify for advanced standing selected by the procedure contained in subdivision (b)(i) of this paragraph to satisfy the number determined by the Administrator, additional apprentices to reach this number shall be selected in ranked order, from those who are over 25 years of age and whose score on the apprenticeship aptitude examination places them below the number otherwise selected pursuant to Paragraph 22.

c) The number of apprentices admitted with advanced standing under subdivision (b)(i) of this paragraph shall be included in the number of apprentices selected pursuant to Paragraph 22 and computed in the total of non-white apprentices selected on the basis of the ratio established pursuant to Paragraph 30. The numbers of apprentices admitted with advanced standing under subdivision (b)(ii) of this paragraph shall not be included in the number of apprentices selected pursuant to Paragraph 22 or computed in the total of non-white apprentices selected on the basis of the ratio established pursuant to Paragraph 30.

d) An advanced apprentice shall be entitled to all rights, privileges and other benefits including work referral, pay, instruction, and supervision accruing to regular apprentices at the same level of training.

e) Apprentices admitted with advanced standing pursuant to Paragraphs 33 through 35 who successfully complete the apprenticeship program may make the applications provided for in Paragraph 16 of this Program.

f) Advanced apprentices assigned for work may be utilized to satisfy City and City-assisted contract requirements for the employment of minority trainees.

36. The coordinator shall develop a pre-examination study group program so as to familiarize all applicants for the Apprenticeship Program with the type of test that they will be given. All applicants shall be notified in writing at least two weeks in advance of the apprentice test that the study program is available to them. Such notice shall contain the date, time, and location of the study group meetings. The meetings shall be held in the evening after 6:30 P.M. Within two weeks of the effective date of this Affirmative Action Program, the Coordinator shall submit a detailed program including but not limited to teaching methodology, program materials, and organization of the groups.

37. In addition to any other records or lists required to be maintained under the terms of this Program or the Order and Judgment, Local 28 and JAC, as the case may be, shall maintain separately for whites and non-whites, records and lists containing the following information, beginning with the effective date of this Program.

- a) Persons who request an application for or apply to take the "hands-on" journeyman's test described in Paragraphs 5 and 8;
- b) Persons who take the "hands-on" journeyman's test described in Paragraphs 5 and 8;
- c) Persons who pass the "hands-on" journeyman's test described in Paragraphs 5 and 8;
- d) Persons who applied for journeyman admission on the basis of experience, described in Paragraph 15;
- e) Persons who are admitted, and those rejected, for journeyman membership on the basis of experience, described in Paragraph 15;
- f) Persons who seek or apply to transfer into Local 28 from an affiliated sister local union;

- g) Persons who inquire of Local 28 about the possibility of transferring into Local 28 from an affiliated sister local union;
- h) Persons who inquire of Local 28 as to the availability of work opportunities with or through Local 28, including but limited to inquiry about or seeking "permits" or "identification slips";
- i) Persons to whom "permits" or identification slips" are issued or work opportunities with or through Local 28 are otherwise made available.
- j) Persons who contact Local 28 or JAC seeking sheet metal work;
- k) Persons who are employed as sheet metal workers or apprentices by Local 28 contractors.
- l) Persons working in sheet metal shops at the time they are organized by Local 28;
- m) Persons who are reinstated to journeyman membership or to the Apprentice Program;
- n) Non-whites who apply for advanced standing in the apprenticeship program described in Paragraphs 33-35;
- o) Non-whites who are granted advance standing in the apprenticeship program and the standing granted as described in Paragraphs 33-35;

The records and lists specified in subsection (a) through (o) of this Paragraph shall contain the name, address, race, or national origin, union affiliation, if any, of each individual listed therein, as well as the date of the application, test, inquiry, contact, or employment (and the name of the contractor, where applicable), and the disposition with reasons, of each such application, test, inquiry, contact or employment. Copies of these records and lists shall be submitted to counsel for the parties and the Administrator at least once every three months.

Said records and lists may exclude telephonic requests for information. However, telephoners should be informed that their requests should be made in writing, and a form of this purpose shall be sent to the telephoner.

38. Local 28 or JAC, as the case may be shall submit the following data to the Administrator and parties at the time specified.

- a) the name and race identify of persons admitted into (i) journeyman status in Local 28 or (ii) apprentice status in the Apprentice Program, within 5 days of such admission;
- b) on January 1 and July 1 of each year the total number of (i) journeyman members of Local 28, (ii) pensioner members of Local 28 (as defined in Paragraph 2), and (iii) apprentices. Such reports shall include the percentage of non-whites in each group.

39. The JAC shall maintain complete records of all applications and other material concerned with the selection and work records of apprentices. These records shall include but not be limited to an applicant log for each examination showing the name, race, date of birth of each applicant, dates of completion of each step in the application procedure, disposition of each step in the application procedure, and disposition of each application. All such records shall be made available for inspection and copying by the plaintiffs at reasonable intervals during normal working hours or at other mutually convenient times. In addition, records shall be submitted to the Administrator and plaintiffs as follows:

- a) Prior to each apprentice entrance test and within 7 days of the closing of the application procedure the JAC shall submit a report including the following information for each person who filed or requested an application for that apprentice examination: name, address, telephone number and race or national origin, if known for those who request applications.

b) Within 20 days after indenturing a class of apprentices the JAC shall provide a report of the names and ethnic classification of all persons who were rejected during the application and testing period and the reason therefore and the names of all persons whose application became inactive and the reason therefore.

c) Every six months subsequent to the indenturing of a class of apprentices the JAC shall furnish a report giving the names of all non-white apprentices, the name(s) of contractors to which each was referred and the number of hours worked.

d) The Joint Apprenticeship Committee shall furnish the names of any non-white apprentices who are dropped from the Apprentice Program. Said information shall be furnished within twenty days from the date action is taken by the Joint Apprenticeship Committee. Said report shall contain the reason why the individual was dropped from the program and the steps taken by the Joint Apprenticeship Committee to retain the individual in the program. The report shall also include the training and employment history of the individual while he was in the program. The Joint Apprenticeship Committee shall furnish the names of all non-white apprentices who leave the program other than by action of the JAC. Such report shall contain the reason the apprentice has left the program as ascertained by an exit interview diligently attempted. Said information shall be furnished within twenty days from the time the JAC is notified that the apprentice has left the program.

40. All records and lists required to be compiled by this Program shall be maintained for ten years and shall be made available for inspection and copying by the parties and the Administrator on reasonable notice during regular business hours or at other mutually convenient time without further order of the court.

Advertising and Publicity

41. The parties shall use their best efforts to disseminate accurate information to the non-white community of opportunities within Local 28 and the Local 28 apprentice program.

42. Prior to each "hands-on" journeyman's test and apprentice entrance test, at a time to be selected by the Administrator to insure full coverage and effectiveness Local 28 (in the case of the "hands-on" journeyman's examination) and JAC (in the case of apprentice entrance tests) shall undertake a program of advertising and publicity, under the overall supervision of the Administrator, designed to inform the non-white community in New York City of the date, location, and nature of such examinations, the qualifications therefore and the opportunities available upon successful completion of the test. Additionally, the overall apprenticeship recruiting and publicity campaign shall include a component limited toward advanced apprentices. These campaigns may include print and electronic media, dissemination of material to community, government and minority organizations. The City of New York may provide space and opportunities for such publicity.

43. By March 1, 1976 Local 28 and JAC shall provide to the Administrator and the other parties a written plan of an effective general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Local 28 apprentice program as provided in the Order and Judgment and this Program. The other parties shall have 30 days to comment upon the written plan and the Administrator, having considered all submissions, shall revise the plan if he deems necessary and shall order it into effect by May 1, 1976.

Work Referral

44. The Administrator shall conduct a study of the present Local 28 work referral system as described in the written statement submitted pursuant to Paragraph 21(g) of the Order and Judgment. This study shall be completed by June 15, 1976 and the Administrator shall submit to the parties such recommendations he deems necessary to assure that non-whites do not bear a disproportionate share of unemployment.

Resolution of Disputes

45. a) The Administrator shall hear and determine all complaints concerning the operation of the Order and Judgment and this Program and shall decide any questions of interpretation and claims of violations of the Order and Judgment and the Program, acting either on his own initiative or at the request of any party herein or any interested person. All decisions of the Administrator shall be in writing and shall be appealable to the Court.

b) Any party or any individual affected by this Program may make a complaint to the Administrator within thirty days after the situation complained of arises. The Administrator shall give the parties notice of such a complaint within five days and, where a hearing is in his discretion warranted, expeditiously schedule such hearing.

General Provisions

46. The union and the JAC shall post conspicuous notices, in language and at locations approved by the Administrator, advising individuals of their rights under this Program within 60 days after the Program is approved by the Court.

47. Nothing contained in the Program should be construed as preventing the Executive Board from adopting portions of the Program for the benefit of whites and other minorities provided that such plans do not interfere with the operation of this Program.

48. Except as modified, changed or amended by the terms of this Program or order of the Administrator, Local 28 and JAC shall not change, modify or amend any aspect of the operation or content of the Apprentice Program, or the conditions or terms upon which an individual shall become a member of the Apprentice Program of Local 28 or entitled to work within the jurisdiction of Local 28.

49. At any time, any of the parties herein may apply to the Administrator and then to the Court for the purpose of seeking additional orders to insure the full and effective implementation of the terms and intent of this Program.

Dated: New York, New York
November 12, 1975

s/David Raff
DAVID RAFF, ESQ.
Administrator

SO ORDERED.

s/HENRY F. WERKER
U. S. D. J.

Dated: November 13, 1975

[Filed November 25, 1975]

APPENDIX A

New York State Division of Employment (Department of Labor)

Department of Employment of the City of New York

Bureau of Labor Services of the City of New York

Recruitment and Training Program, Inc.

Fight Back

Asian Americans for Equal Employment

Black Economic Survival

Regional Neighborhood Manpower Service Centers of New York City

New York City Board of Education (Public High School and Evening Trade Division)

Williamsburg Coalition

New York Urban League

National Association for the Advancement of Colored People

Puerto Rican Community Development Project

National Association for Puerto Rican Civil Rights

Citywide Coalition of Black, Hispanic, and Asians in Construction

New York Project Equality

Commonwealth of Puerto Rico

Opportunities Industrialization Center of New York, Inc.

Bedford-Stuyvesant Restoration Corp.

New York City Human Rights Commission*

New York State Division of Human Rights*

MEMORANDUM AND ORDER

WERKER, District Judge.

The court has read and considered the Affirmative Action Program submitted by the Administrator, the objections submitted by Local 28, the JAC, the City, and the E.E.O.C. together with all appendices and replies to each other's objections which were filed in court before 3 p. m. on October 17, 1975.

The following are the observations and rulings of the court which the Administrator is directed to implement by amendment and modification of the Program as submitted. References

are to sections of the Program unless otherwise noted. Sections which are not otherwise mentioned are approved by implication.

1. Section 1 is approved.

[1] 2. Section 2. While the court's order and judgment did not set interim goals it was hoped that the parties could agree upon such goals as would realistically result in the ultimate percentage at the deadline. The court finds that the proposed goals are not excessive and are consequently approved. The suggestions of counsel for Local 28 are rejected as being the same type of approach to this problem as has been taken by the Union over the last ten years and which has resulted in a mere 4% non-white membership.

[2] To the extent that pensioners are defined in the Program that definition is adopted by the court. Without discounting the political effect which the non-working pensioners' votes may have, it is the court's rationale that the Program's goals should be primarily addressed to the work force rather than the internal operations of the Union. To do otherwise might create constitutional issues which have no place in this Program or litigation. It is the court's belief that ultimately the Union membership, including pensioners, will recognize the rights of non-whites and the fact that those rights must be enforced regardless of the cost to the courts or the governments involved in order to secure to all working people those rights which the Constitution has guaranteed.

[3-6] 3. Sections 3(b) and 15. There is an implied assumption on the part of Local 28 that the Program may be dragged out until the penultimate date and that it need not diligently and forcefully attempt to achieve the ultimate goal at an earlier date. Nothing is further from the contemplation of the court. If that goal can be reached in 1, 2 or 3 years then it should be so reached. This is why the court adopts the proposals contained in the above-numbered paragraphs. Defendant Local 28's claim that no necessity or desirability has been shown and that

the proposal is premature is, for the reason above stated, as well as the whole purpose of the litigation, misguided. All avenues are opened by the opinion and should remain open until the goal is reached. To the extent that this was labeled an option in the opinion, it was an option open to non-whites. If a sufficient number can be found who are qualified they should be admitted. Since the program is prospective, no one can now know how many non-whites there are who are qualified under these paragraphs.

There would appear to be no reason for an age limit qualification other than the age of 18.

The court adopts the proposal for a tripartite examining board.

If it be true that many of the present membership reside outside the limits of New York City there is no reason why applicants should be restricted to New York City. The residency requirement should be increased to six (6) months to assure bona fide residency. Throughout the Program the qualifications should include a requirement of citizenship or an alien status which legally permits work in the United States.

[7-9] 4. Sections 4(b) and 33-36. These sections are approved except as noted below. What was said about goals in paragraphs 1 and 2 hereof is also applicable here.

Paragraph 33(b) should be deleted to the extent that it does not require examination. It appears to the court that all applicants should be required to take the aptitude test. It should not be left to conjecture as to whether the applicant has the aptitude to become a journeyman. If he does not pass the aptitude test there would appear to be no reason why he should be placed in an advanced position in the apprenticeship program. Furthermore all those placed in an advanced position should be so placed conditionally based upon classroom work and on job performance for a period to be determined by the coordinator not exceeding three months.

Section 36 should not be deleted. It should be broadened to provide that nothing contained in the Program should be construed as preventing the Executive Board from adopting portions of the Program for the benefit of whites and other minorities provided that such plans do not interfere with the operation of this Program.

5. Sections 5, 6, 7, 8 and 9 are approved.

6. Section 10 is approved except with respect to age which shall be fixed at 18 (10(b)), and residency (10(c)).

[10-12] 7. Section 11 is supplemented to the extent requested in defendant Local 28's objection 8.

An examination of the application form annexed to Local 28's objections does not indicate that it is unduly complicated. An update of the informational items will, however, be required. The applicants should be informed in writing as to the place of examination with instructions as to how to reach the place and or a map indicating its location.

The maximum examination fee of \$25 is adopted provisionally. The defendants may apply to the Administrator for an increase upon a showing that such an increase is needed. Verified costs, *i. e.*, vouchers *verified* by vendors, should be presented to show these costs. The evidence submitted by the City indicates that even this fee is prohibitive to application by a number of non-whites. An initial screening of applicants for the journeyman test ought to be held by the organizations through which they are produced and/or the Union. Results of the journeyman test of October 11, 1975 may indicate that some applicants who took the test were not qualified to do so. This results in wasted effort on everyone's part. Without suggesting that it has been done, we are not interested in testing a number of bodies but persons who are actually qualified but have been discriminated against in the past.

[13, 14] 8. Paragraphs 15, 16 and 17 are approved. In 16(b) the proration of the initiation fee over a period of two years

is unnecessarily restrictive. This should be amended to relate to *income* not *time* and should possibly be included in check off provisions. Thus perhaps 10% of the net check should be paid for the initiation fee until the fee is paid.

The objection contained in defendant Local 28's objection 12B has no place in this Program. It is the assumption of the court that any affirmative action provisions contained in the Program for non-whites with respect to 16(a) and (b) will equally be applicable to whites and other minorities.

9. Paragraph 17 of the plan is approved. With the additional language to be added as set forth in the City's letter of October 15, 1975, page 1.

10. Paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 are approved. The date for the December test is the 13th not the 11th as shown in the Program in paragraph 28.

11. The suggestion of the United States Attorney, amending the first sentence of paragraph 30 as contained in his letter of October 10, 1975 at page 2 is approved. The deletion of the second sentence is approved and the insertion in its place of the City's paragraph in p. 3 of its letter of October 10, 1975 is approved.

12. Paragraph 31 is approved.

[15-17] 13. Paragraph 32 is amended so as to provide that the successful applicant will bear one-half the cost and JAC the other half. The importance of sound physical condition is such that the safety of all are involved in it. The cost as thus reduced to the applicant assuming a \$34 maximum should be easily payable. The utilization of facilities other than those used by JAC is not acceptable since the nature of the examination is subject to too many variations and possible unethical practices.

As indicated earlier, paragraph 33(b) is in part deleted. The court believes that it is unfair to other applicants to exempt those

claiming one year or more experience from the aptitude test. Furthermore if the test is as job-related as it should be those with the experience should have no difficulty with it. The preference to be granted should be based upon scores and work experience as determined by the coordinator. The number to be admitted should be determined by the Administrator based upon the certification by the coordinator and the needs of the apprentice program at any given time. This will require rewriting paragraphs 33 and 35 and possibly paragraph 31(b).

[18] 14. With respect to the Union's objections to the adoption of a rotation system of employment for apprentices, it is suggested that the adoption of such a system will motivate more apprentices to continue in the trade and will eliminate the probability that the upper classmen apprentices, who may be mostly white, will be preferred over lower classmen who will, it is hoped, be significantly non-white. The court finds these two reasons sufficiently persuasive to adopt the program during the period of transition to the 29% goal.

[19, 20] 15. With respect to paragraph 37 the court agrees that telephonic requests for information should be excluded from the record keeping. Telephoners should, however, be informed that their requests should be made in writing and a form for this purpose should be sent to them with regard to each of the categories mentioned in this paragraph.

The submission of these records once every three months during the first year of the Program and thereafter every six months is approved.

16. Sections 39, 40, 41, 42, 43, 44 and 45, 46, 47, 48 are approved as they are set up in the plan.

[21] 17. It should be noted by the parties that in the court's concept of the role of the Administrator, he is not a neutral person. He is the executor of the order and judgment of the court and its alter ego and, to that extent, he is partisan to the letter and spirit of the court's judgment. It has been brought to the

attention of the court that numerous small harassing tactics have been utilized during the period from the date of the judgment to this date. A continuation of such practices is proscribed.

[22] 18. It appears that the major source of journeymen will ultimately be the apprenticeship program. The court has found that the test as administered was a major obstacle to non-white participation in this program. It would appear to the court that this may be so with respect to even validated tests. As a consequence, the Administrator is directed to incorporate in the program a pre-examination study group program to be conducted by the coordinator so as to familiarize *all* applicants with the *type* of test to which they will be exposed.

19. In the contemplation of the court the 29% figure reached in the judgment may result by the time the deadline is reached, in a lesser number of non-whites, than estimated at the time of the judgment, assuming an increase in attrition of Union membership due to the economy or other factors not now foreseeable. Thus accurate reporting of membership is an essential part of the Program.

The corrections and clarifications contained in the United States Attorney's letter of October 10, 1975 as applicable are adopted and approved.

The Administrator is directed to redraft the Program in accordance with this memorandum and order. Oral argument is denied as being unproductive.

So ordered.

ANNEX

PROPOSED AFFIRMATIVE ACTION PROGRAM

Introduction

1. This Affirmative Action Program ("Program") is adopted pursuant to the Decision and Order dated July 18, 1975 and the Order and Judgment

dated August 28, 1975 and entered in this action on September 2, 1975 ("Order and Judgment"). The goal of this Program is to assure that the non-white* membership in Local Union No. 28 of the Sheet Metal Workers' International Association "Local 28") reaches a minimum level of 29% by July 1, 1981; to assure that substantial and regular progress is made toward this goal in each year prior to 1981; and to assure that non-white members of Local 28 and non-white apprentices of Local 28 share equitably in all employment opportunities afforded to members of Local 28.

2. For the purpose of reaching the above goal of 29% by July 1, 1981 this Program established as interim percentage goals for the non-white membership of Local 28 the following:

July 1, 1976	10%
July 1, 1977	13%
July 1, 1978	16%
July 1, 1979	20%
July 1, 1980	24%

Each of the above percentages shall be measured against the total membership of Local 28 as of each interim goal date respectively and the final goal date. For the purpose of measurement, total membership shall include all journeyman members, all pensioners** who have been employed as sheetmetal workers within the last three years, and all members or participants in the Local 28 Apprentice Program ("apprentice Program"). The parties to this action and the Administrator are to implement this Program so that these interim goals may be attained. The Administrator shall periodically review the progress toward the attainment of these goals and take such action as he is empowered to take under the Order and Judgment to assure their achievement.

3. Admission to Journeyman membership in Local 28 shall be attained only through the following procedures:

- a) Successful completion of a "hands-on" journeyman test administered pursuant to Paragraphs 5-14; or
- b) establishment of proof of the required experience in the sheetmetal trade pursuant to Paragraph 15; or

* "Non-white" as used in the Program means black and Spanish surnamed individuals.

** "Pensioner" as used in the Program means any individual who receives benefits from the Local 28 pension program.

- c) successful completion of the Local 28 Apprentice Program; or
- d) transfer in accordance with the Sheet Metal Workers' International Union Constitution and Ritual; or
- e) organization of non-union shops.

4. Membership in the Apprentice Program shall be obtained only through the following procedures:

- a) successful completion of an apprentice aptitude test as set forth in Paragraphs 21-32; or
- b) entry with advanced standing as set forth in Paragraphs 33 through 36.

Admission to Journeyman Status

5. Under the supervision and with approval of the Administrator, Local 28 shall administer a "hands-on" journeyman's test on October 11, 1975 designed to test fairly and in a non-discriminatory manner the skills needed for a journeyman sheet metal worker. This test and its grading shall be in substance the equivalent of the "hands-on" portion of journeyman's test given by Local 28 in November, 1969 as revised by a sheetmetal expert provided by the plaintiffs or the New York State Division of Human Rights. Disputes as to any proposed revisions shall be resolved by the Administrator. There shall be a filing fee of \$25 for this test.

6. Local 28 shall undertake a program of publicity and advertising and prepare, make available, and process applications relating to the October 11, 1975 "hands-on" journeyman's test in accordance with the standards and conditions set forth heretofore by the parties and the Administrator. The administration and grading of the test shall be under the overall supervision of the Administrator and shall be accomplished and recorded in such a manner as to facilitate the professional development and validation of future "hands-on" journeyman's tests.

7. Under the following conditions all persons who receive a passing grade in the test described in Paragraph 5 and 6, and who are physically fit for sheetmetal work shall be eligible for admission to full journeyman membership in Local 28 as follows:

- a) all non-white applicants who receive a passing grade, up to a total of 200 such applicants, shall be admitted to journeyman membership by December 1, 1975 in accordance with and subject to the provisions of Paragraphs 16-18 of the Program. In the event that more than

200 non-white applicants receive a passing grade and elect to exercise their rights to admission to journeymen membership under this Program, the 200 non-whites with the highest grades shall be admitted by December 1, 1975; the remaining non-white applicants shall be admitted in accordance with the provisions of sub-paragraph (b) of this paragraph;

- b) white applicants who receive a passing grade shall be placed on a list and ranked in descending order on the basis of their grades on the examination.
- i) white applicants shall be selected for admission in the order of their ranking on the above described list on the basis of a ratio to the non-whites admitted pursuant to section (a) of this Paragraph. Said ratio shall be agreed upon by the parties, but in no event shall the ratio of non-whites to whites be less than 1 to 1. Such ratio shall be designed with the purpose of implementing the interim goals set forth in Paragraph 2. If the parties cannot agree on a ratio by November 10, 1975 the Administrator shall establish such ratio by November 15, 1975.
- ii) all applicants who receive a passing grade but who are not admitted pursuant to sub-paragraph (a) or section (i) of subparagraph (b) may be ordered admitted to journeyman membership by the Administrator at a time deemed suitable by him. White applicants who have received a passing grade and who are not admitted by March 1, 1976 shall be eligible for a selection priority over other white applicants qualified by the journeyman's tested held in the Spring of 1976, or subsequent tests. Non-white applicants who have received a passing grade and who are not admitted pursuant to subparagraph (a) shall be admitted by July 1, 1976, if they so elect.

8. Local 28 shall administer a non-discriminatory, "hands-on" journeyman's test under the overall supervision and approval of the Administrator in the Spring of 1976 and at least once a year thereafter. The Administrator, after consultation with the parties, may apply to the Court to decrease the frequency of the tests consistent with the requirements of the interim goals set forth in Paragraph 2.

9. The journeyman's "hands-on" tests administered pursuant to Paragraph 8 shall be professionally developed and validated in accordance with EEOC Guidelines. Within a reasonable time before the administration of each test (which shall not be less than four weeks unless good cause is shown), Local 28 shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of the test and (ii) a copy of the test to be administered, provided that counsel for the parties and the Administrator

shall not distribute or disclose the contents of the test to any individual or organization except for the purpose of professional validation thereof.

10. All qualified applicants shall be eligible to take the "hands-on" journeyman test specified in this Program. A qualified applicant is defined as follows: any person who

- a) has or will have attained the age of 22 by the date of the test, and
- b) is a citizen or a lawful permanent resident alien legally entitled to work in the United States, and
- c) has resided in New York City or the counties of Westchester (N.Y.) Nassau (N.Y.) Suffolk (N.Y.), Passaic (N.J.) Bergen (N.J.) Hudson (N.J.) Union (N.J.) or Essex (N.J.) for 60 consecutive days prior to the filing of an application, and
- d) has one year of sheet metal work experience including but not limited to employment as a member in any branch of Local 400 of the Sheet Metal Workers International Association, sheet metal experience in the Armed Forces or vocational education or training related to the skills of a journeyman sheet metal worker.

Persons presently registered or recently registered in the Local 28 Apprenticeship Program or any other recognized apprenticeship program affiliated with the Sheet Metal Workers' International Association are not eligible.

11. Subject to the approval of the Administrator, Local 28 shall develop a standardized application form for the "hands-on" journeyman's test. Such forms shall include only the following:

- a) provisions for the name, address, telephone number, social security number, age, sex and race or ethnic identification of the applicant (with a notation that information regarding race or ethnic identification is required solely for the purpose of compliance with the court order herein and the regulations of the United States Equal Employment Opportunity Commission), and previous sheet metal experience.
- b) information regarding the eligibility requirements, fee, date, time, location, and nature of the "hands-on" journeyman's test.

12 Local 28 shall make available an application form for the "hands-on" journeyman's test and a short description of the nature of the test in the following manner:

- a) at the offices of Local 28;

- b) by mail in response to inquiries and requests made by mail;
- c) in bulk to plaintiffs, City Department of Employment, the New York State Employment Service, Recruitment and Training Program, Inc., Fight Back, and the other governmental or community agencies listed in Appendix A as amended from time to time.

Completed applications for the test shall be accepted by mail or delivery in person at the offices of Local 28. Local 28 may establish, with the approval of the Administrator, a suitable cut-off date for the acceptance of applications. Local 28 may establish a fee for the taking of the "hands-on" journeyman test consistent with the cost of administering such a test, but in no event shall such fee exceed \$25.00.

13. The "hands-on" journeyman test shall be graded by a Board of Examiners consisting of three members knowledgeable in Sheet Metal: a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the Plaintiffs and the State Division of Human Rights. Such Board shall act by majority vote. Said Board of Examiners shall employ the passing grade level developed pursuant to the validation procedures set forth in Paragraph 9. All applicants shall be advised of their status by first class mail within 30 days of the test. Non-whites who fail the test shall be advised of their possible eligibility for advanced standing in the apprenticeship program.

14. (a) A qualified non-white applicant who passes the test and is physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 within 60 days of the test unless the applicant elects to defer admission pursuant to Paragraph 19.

(b) A qualified white applicant who passes the test and is physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 in accordance with the following procedures:

(i) within 20 days of the test the parties shall attempt to agree on an appropriate ratio of non-whites to whites to be admitted to journeyman status. This ratio will be established with the purpose of fairly implementing the interim and final goals set forth in Paragraphs 1 and 2 but in no event shall said ratio be less than one-to-one. If no agreement is reached within 20 days, the Administrator shall establish the ratio within 5 days thereafter.

(ii) in accordance with the above ratio white applicants shall be admitted on the basis of the highest scores achieved on the "hands-on" journeyman test;

c) To the best of their ability the parties and the Administrator shall endeavor to set forth on the application form the most accurate estimate of

the opportunities available to whites based on the number of preferred candidates pursuant to Paragraph 7(b), the number of expected non-white candidates, and past experience.

15. Commencing January 1, 1976 there shall be established a program for admission to Local 28 journeyman membership of non-whites who have had four years experience obtained in the United or elsewhere, in sheet metal work or employment reasonably related or similar to sheet metal work, including experience in the Armed Forces, or vocational training related to the skills of a sheet metal worker. Persons eligible for admission under this program must,

- a) be a resident of New York City, or the counties of Nassau (N.Y.) Suffolk (N.Y.) Westchester (N.Y.), Bergen (N.J.) Passaic (N.J.) Essex (N.J.) Union (N.J.) or Hudson (N.J.) for 60 consecutive days prior to application; and
- b) be age 22 or over; and
- c) be physically fit to perform sheet metal work; and
- d) establish to the satisfaction of a majority of a board of three members knowledgeable in sheet metal work, comprised of a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the plaintiffs and the State Division of Human Rights that the applicant has the requisite sheet metal experience.

The Administrator, after due consultation with all the parties, shall establish procedures for application to this program, for investigation and verification of the criteria set forth in subparagraphs (a) through (d), and for the timing and conditions of admission. Appropriate publicity for the program shall be undertaken at the direction and with the approval of the Administrator.

16. (a) Upon proper application, a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraphs 5 through 15 or Paragraph 35(d) of this Program may request of Local 28's Executive Board that the Local 28 initiation fee be reduced pursuant to the provisions of Paragraph 22(d) of the Order and Judgment. Within 5 days of receipt of such application, the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator and the parties of the disposition of the application (the notification to the Administrator and the parties shall include the name and address of the applicant). If such application is denied in whole or in part, or is not acted upon within five days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the request in

writing after duly considering all the factors set forth in Paragraph 22(d) of the Order and Judgment. In considering such an application the Administrator may require the submission of such information, documents, or other data from either Local 28 or the applicant as he deems necessary.

(b) Upon proper application a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraphs 5 through 15 or Paragraph 35(d) may request of the Local 28 Executive Board that payment of the Local 28 initiation fee be pro-rated over a period of time not to exceed two years. Within 5 days of the receipt of such application the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator and all parties of the disposition of the application (the notification to the Administrator and the parties shall include the applicant's name and address). If such application is denied in whole or in part or not acted upon within 5 days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the application in writing and set such schedules and payments as he shall determine. The decisions of the Executive Board of Local 28 and the Administrator shall be made having duly considered all pertinent facts, including, but not limited to, the following circumstances:

- i) the financial circumstances of the applicant and Local 28;
- ii) the present and future employment situation in the sheet metal industry in New York City in general;
- iii) the likelihood and nature of future employment for the individual applicant

17. At any time after an application pursuant to Paragraph 16 has been pending with the Administrator for more than 5 days a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraph 5 through 15 or Paragraph 35(d) of this Program shall be admitted conditionally to journeyman membership upon payment of \$100 dollars and three months dues pending the determination of the Administrator which shall be made within 30 days of the date of the application to the Administrator. During such conditional membership an applicant will be entitled to all the rights and privileges of regular journeyman membership.

18. The granting of any application pursuant to Paragraph 16 shall not diminish any rights or privileges accruing to journeyman membership in Local 28.

19. A person eligible for admission pursuant to Paragraphs 5 through 14 shall be permitted to defer such admission for up to six months from the time he is first entitled to be admitted. During such period, a person who has elected

to defer may apply to the administrator for further deferral of admission for up to another 12 months. If an applicant invokes his right of deferral he shall be admitted, on the same terms and conditions as he was previously entitled, within 30 days of written notice to Local 28 that he seeks to be admitted.

20. Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and pursuant to Paragraph 22(f) of the Order and Judgment.

Apprentice Program

21. The Local 28 Joint Apprenticeship Committee ("JAC") shall maintain an apprentice program of four years duration or less. The terms and conditions of the apprentice program shall be as set forth in the Collective Bargaining Agreement ("Standard Form of Union Agreement . . . between Local . . . and Sheet Metal Contractors."), the Local 28 Joint Apprenticeship Trust and Indenture, and the rules and regulations thereunder except where modified by the Order and Judgment, the provisions of this Program, or order of the Administrator pursuant to his powers under the Order and Judgment.

22. The apprentice program shall indenture no less than 300 apprentices by July 1, 1976 of which no less than 100 apprentices shall be indentured by February 2, 1976. No less than 200 apprentices shall be indentured in each year thereafter up to and including 1981. Said number shall include those apprentices admitted with advanced standing. The JAC may indenture apprentices in two separate classes during a year.

23. Apprentices shall be assigned for employment in a ratio of not less than one apprentice for every four journeymen working of the aggregate journeymen employed. Seniority shall not be a criterion for employment, and apprentices shall be rotated for employment where necessary and feasible. The JAC shall make every effort to provide apprentices with classroom instructions including evenings and Saturdays where necessary, during periods of unemployment, and shall credit such hours toward fulfillment of apprenticeship requirements. The JAC may authorize the accelerated advancement or graduation of any apprentice as it deems proper.

24. Upon successful completion of the Apprenticeship Program, apprentices shall be promptly admitted to full journeyman membership upon payment of the balance due of the initiation fee, if any, which upon application to the Local 28 Executive Board, may be paid on an installment basis for good cause shown, and subject to the procedures contained in Paragraph 16.

25. Applications shall be made available to and accepted from any qualified candidate. A qualified candidate is defined as follows: any person who is deemed physically fit for sheet metal work and who has or will have attained the

age of 18 years by the date of indenture of the next scheduled apprentice class and who is not older than 25 years of age (for veterans of active military duty the age limit is extended one year for each year of such duty up to the age of 30 and up to the age of 35 for non-whites applying for advanced standing). For the apprentice aptitude test to be administered in November, 1975 only, JAC may require proof of completion of a tenth grade course of education. The JAC shall validate the tenth grade requirement before said requirement may be imposed for subsequent examinations.

26. With the approval of the Administrator JAC shall develop a standardized application form for the Apprentice Program. The application form shall include information about the date of the next class of apprentices to be indentured, and shall require only the following information of the applicant:

- a) Name, address and telephone number;
- b) Birth date and age;
- c) Social Security number;
- d) Extent of education;
- e) Sex;
- f) Race or ethnic classification; (with a notation that this information is required solely for the purposes of compliance with federal anti-discriminations statutes);
- g) military service;
- h) convictions and pending criminal charges.
- i) Citizenship or lawful permanent resident alien status

27. Application forms for the Local 28 JAC Apprentice Program shall be available at the offices of the JAC during normal business hours and at the offices of the organizations listed in Appendix A at least 60 days before an examination. Application forms shall be made available by mail upon written request. Completed applications shall be accepted in person or by mail at the offices of the JAC. There shall be a filing fee of no more than \$15.00. Application forms shall be made freely available to any governmental employment office and minority community organizations not listed in Appendix A upon request. The time for filing applications for a particular apprentice test may be closed by the JAC at a reasonable time (not to exceed three weeks) before the date of the examination.

28. An apprentice aptitude test shall be given on December 11, 1975 and at least once yearly thereafter at a date, time and location approved by the

Administrator. The test shall consist of the following professionally developed and validated components: (1) a basic "read and follow directions" test designed to ascertain an applicant's ability to master and understand those written and verbal instructions, directions, and other communications necessary to participate in the Apprentice Program at the first year level; and (2) a mechanical comprehension test similar in substance and scope to that mechanical comprehension test administered by JAC in April 1969. There shall be professionally developed and validated a qualifying score on the "read and follow directions" test designed to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level. [Consideration of the inclusion of a math test in the December examination has been postponed. See attached letter.]

29. Within three weeks of the administration of an apprentice entrance test, JAC shall provide the Administrator and all parties with:

- (a) the names, race identification, raw scores and rank of all candidates on all tests; and
- (b) the mean and median scores on all tests of all identifiable racial and ethnic groups among the candidates.

30. Persons selected to be indentured as apprentices pursuant to Paragraph 22 shall be selected in accordance with: a ratio of non-whites-to-whites which shall be established by agreement of the parties within 30 days after the tests results are known, or by the Administrator within 15 days thereafter if the parties fail to agree. The parties shall agree by November 10, 1975, what the ratio shall be for the classes to be indentured in February and June, 1976. If no agreement is reached the Administrator shall establish the ratio by November 15, 1975. In arriving at an appropriate ratio for the entry of non-whites and whites into the Apprentice Program, the parties and the Administrator shall use their best efforts to assure that the total population of the program shall not exceed 60% non-white individuals, and that an individual term or class shall not exceed 70% non-white individuals.

31. In fulfillment of JAC's and Local 28's obligations under Paragraphs 22 and 30 apprentices chosen by means of the apprenticeship entrance test shall be selected from those who meet or exceed the qualifying score on the "read and follow directions" test in the following manner:

- (a) the white apprentices shall be selected on the basis of the highest scores received on the mechanical comprehension test among the white eligible qualified candidates;
- (b) the non-white apprentices shall be selected on the basis of the highest scores received on the mechanical comprehension test among non-white eligible qualified candidates subject to the provisions of paragraph 35.

32. Persons selected for the Apprentice Program may be required to appear for orientation and a physical examination prior to being indentured. The cost of physical examinations are to be borne by successful applicants. Additional persons may be invited to orientation and a physical examination by Local 28 JAC if that appears desirable. Persons selected in accordance with the above procedures shall be indentured as apprentices unless such indenturing is waived by them, or they are certified physically unable to perform sheet metal work by a medical practitioner licensed in New York State.

Advanced Apprentices

33. There shall be established by the JAC procedures for the admission and advanced placement in the Apprentice Program of non-white apprentices who have experience in sheet metal work or trade education but cannot perform at journeyman level. Applicants for advanced placement shall be physically fit and shall be not less than 18 years old or more than 35 years old by the date of indenture of the next scheduled apprentice class. For such person applying to be indentured in February and July, 1976 only, the JAC may require proof of completion of a tenth grade course of education by that date. Such requirement must be validated for subsequent utilization.

- a) Applicants with at least six months but less than one year experience in sheet metal work or trade education shall be eligible to take the apprenticeship aptitude examination as set forth in Paragraph 28.
- b) Applicants with more than one year experience in sheet metal work or trade education shall be eligible for indenture without taking the examination.
- c) The overall apprenticeship recruiting and publicity campaign shall include a component directed toward advanced apprentices.

34. The Training Coordinator of JC shall evaluate the experience of all applicants for advanced standing and shall make placement to the appropriate grade level. Applicants who challenge the grade level assigned shall be advised of their right to appeal to the Administrator.

35. a) Apprentices shall be selected for advanced standing in the following manner: those who meet the requirements of Paragraph 33(a) whose ranking on the apprenticeship aptitude examination qualifies them for acceptance into the apprenticeship program shall be admitted with advanced standing along with such numbers of those who meet the requirements of Paragraph 33(b) so that the combined total of advanced apprentices shall equal the number of non-white first term apprentices admitted, unless the group of advanced apprentices is sooner exhausted.

b) The number of apprentices admitted with advanced standing shall be included in the total of non-white apprentices selected on the basis of the ratios established pursuant to Paragraph 30.

c) An advanced apprentice shall be entitled to all rights, privileges and other benefits including work referral, pay, instruction, and supervision accruing to regular apprentices at the same level of training.

d) Apprentices admitted with advanced standing pursuant to Paragraphs 33 through 35 who successfully complete the apprenticeship program may make the applications provided for in Paragraph 16 of this Program.

e) Advanced apprentices assigned for work may be utilized to satisfy City and City-assisted contract requirements for the employment of minority trainees.

36. Nothing in Paragraphs 33-35 is intended to preclude the JAC from establishing a similar program for whites.

Records

37. In addition to any other records or lists required to be maintained under the terms of this Program or the Order and Judgment, Local 28 and JAC, as the case may be, shall maintain separately for whites and non-whites, records and lists containing the following information, beginning with the effective date of this Program.

- a) Persons who request an application for or apply to take the "hands-on" journeyman's test described in Paragraphs 5 and 8;
- b) Persons who take the "hands-on" journeyman's test described in Paragraphs 5 and 8;
- c) Persons who pass the "hands-on" journeyman's test described in Paragraphs 5 and 8;
- d) Persons who applied for journeyman admission on the basis of experience, described in Paragraph 15;
- e) Persons who are admitted, and those rejected, for journeyman membership on the basis of experience, described in Paragraph 15;
- f) Persons who seek or apply to transfer into Local 28 from an affiliated sister local union

- g) Persons who inquire of Local 28 about the possibility of transferring into Local 28 from an affiliated sister local union;
- h) Persons who inquire of Local 28 as to the availability of work opportunities with or through Local 28, including but not limited to inquiry about or seeking "permits" or "identification slips";
- i) Persons to whom "permits" or "identification slips" are issued or work opportunities with or through Local 28 are otherwise made available.
- j) Persons who contact Local 28 or JAC seeking sheet metal work;
- k) Persons who are employed as sheet metal workers or apprentices by Local 28 contractors.
- l) Persons working in sheet metal shops at the time they are organized by Local 28;
- m) Persons who are reinstated to journeyman membership or to the Apprentice Program;
- n) Non-whites who apply for advanced standing in the apprenticeship program described in Paragraphs 33-35;
- o) Non-whites who are granted advance standing in the apprenticeship program and the standing granted as described in Paragraphs 33-35;

The records and lists specified in subsection (a) through (o) of this Paragraph shall contain the name, address, race, or national origin, union affiliation, if any, of each individual listed therein, as well as the date of the application, test, inquiry, contact, or employment (and the name of the contractor, where applicable), and the disposition with reasons, of each such application, test, inquiry, contact or employment. Copies of these records and lists shall be submitted to counsel for the parties and the Administrator at least once every three months.

38. Local 28 or JAC, as the case may be shall submit the following data to the Administrator and parties at the time specified.

- a) the name and race identity of persons admitted into (i) journeyman status in Local 28 or (ii) apprentice status in the Apprentice Program, within 5 days of such admission;
- b) on January 1 and July 1 of each year the total number of (i) journeyman members of Local 28, (ii) pensioner members of Local 28 (as defined in Paragraph 2), and (iii) apprentices. Such reports shall include the percentage of non-whites in each group.

39. The JAC shall maintain complete records of all applications and other material concerned with the selection and work records of apprentices. These records shall include but not be limited to an applicant log for each examination showing the name, race, date of birth of each applicant, dates of completion of each step in the application procedure, disposition of each step in the application procedure, and disposition of each application. All such records shall be made available for inspection and copying by the plaintiffs at reasonable intervals during normal working hours or at other mutually convenient times. In addition, records shall be submitted to the Administrator and plaintiffs as follows:

- a. Prior to each apprentice entrance test and within 7 days of the closing of the application procedure the JAC shall submit a report including the following information for each person who filed or requested an application for that apprentice examination: name, address, telephone number and race or national origin, if known for those who request applications.

- b. Within 20 days after indenturing a class of apprentices the JAC shall provide a report of the names and ethnic classification of all persons who were rejected during the application and testing period and the reason therefore and the names of all persons whose application became inactive and the reason therefore.

- c. Every six months subsequent to the indenturing of a class of apprentices the JAC shall furnish a report giving the names of all non-white apprentices, the name(s) of contractors to which each was referred and the number of hours worked.

- d. The Joint Apprenticeship Committee shall furnish the names of any non-white apprentices who are dropped from the Apprentice Program. Said information shall be furnished within twenty days from the date action is taken by the Joint Apprenticeship Committee. Said report shall contain the reason why the individual was dropped from the program and the steps taken by the Joint Apprenticeship Committee to retain the individual in the program. The report shall also include the training and employment history of the individual while he was in the program. The Joint Apprenticeship Committee shall furnish the names of all non-white apprentices who leave the program other than by action of the JAC. Such report shall contain the reason the apprentice has left the program if known by the JAC. Said information shall be furnished within twenty-days from the time the JAC is notified that the apprentice has left the program.

40. All records and lists required to be compiled by this Program shall be maintained for ten years and shall be made available for inspection and copying by the parties and the Administrator on reasonable notice during regular business hours or at other mutually convenient time without further order of the court.

Advertising and Publicity

41. The parties shall use their best efforts to disseminate accurate information to the non-white community of opportunities within Local 28 and the Local 28 apprentice program.

42. Prior to each "hands-on" journeyman's test and apprentice entrance test at a time to be selected by the Administrator to insure full coverage and effectiveness, Local 28 (in the case of the "hands-on" journeyman's examination) and JAC (in the case of apprentice entrance tests) shall undertake a program of advertising and publicity, under the overall supervision of the Administrator, designed to inform the non-white community in New York City of the date, location, and nature of such examinations, the qualifications therefor and the opportunities available upon successful completion of the test. These campaigns may include print and electronic media, dissemination of material to community, government and minority organizations. The City of New York may provide space and opportunities for such publicity.

43. By March 1, 1976 Local 28 and JAC shall provide to the Administrator and the other parties a written plan of an effective general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Local 28 apprentice program as provided in the Order and Judgment and this Program. The other parties shall have 30 days to comment upon the written plan and the Administrator, having considered all submissions, shall revise the plan if he deems necessary and shall order it into effect by May 1, 1976.

Work Referral

44. The Administrator shall conduct a study of the present Local 28 work referral system as described in the written statement submitted pursuant to Paragraph 21(g) of the Order and Judgment. This study shall be completed by June 15, 1976 and the Administrator shall submit to the parties such recommendations he deems necessary to assure that non-whites do not bear a disproportionate share of unemployment.

Resolution of Disputes

45. (a) The Administrator shall hear and determine all complaints concerning the operation of the Order and Judgment and this Program and shall decide any questions of interpretation and claims of violations of the Order and Judgment and the Program, acting either on his own initiative or at the request of any party herein or any interested person. All decisions of the Administrator shall be in writing and shall be appealable to the Court.

(b) Any party or any individual affected by this Program may make a complaint to the Administrator within thirty days after the situation complained of arises. The Administrator shall give the parties notice of such a complaint within five days and, where a hearing is in his discretion warranted, expeditiously schedule such hearing.

General Provisions

46. The union and the JAC shall post conspicuous notices, in language and at locations approved by the Administrator, advising individuals of their rights under this Program within 60 days after the Program is approved by the Court.

47. Except as modified, changed or amended by the terms of this Program or order of the Administrator, Local 28 and JAC shall not change, modify or amend any aspect of the operation or content of the Apprentice Program, or the conditions or terms upon which an individual shall become a member of the Apprentice Program of Local 28 or entitled to work within the jurisdiction of Local 28.

48. At any time, any of the parties herein may apply to the Administrator and then to the Court for the purpose of seeking additional orders to insure the full and effective implementation of the terms and intent of this Program.

Dated: New York, New York

October 7, 1975

(s) David Raff

DAVID RAFF, ESQ.

Administrator

SO ORDERED

U. S. D. J.

Date:

APPENDIX A

New York State Division of Employment (Department of Labor)

Department of Employment of the City of New York

Bureau of Labor Services of the City of New York

Recruitment and Training Program, Inc.,

Fight Back

Asian Americans for Equal Employment

Black Economic Survival

Regional Neighborhood Manpower Service Centers of New York City

New York City Board of Education (Public High School and Evening Trade Division)

Williamsburg Coalition

New York Urban League

National Association for the Advancement of Colored People

Puerto Rican Community Development Project

National Association for Puerto Rican Civil Rights

Citywide Coalition of Black, Hispanic, and Asians in Construction

New York Project Equality

Commonwealth of Puerto Rico

Opportunities Industrialization Center of New York, Inc.

Bedford-Stuyvesant Restoration Corp.

New York City Human Rights Commission*

New York State Division of Human Rights*

OBJECTIONS OF NEW YORK CITY

October 10, 1975
BY HAND

Hon. Henry F. Werker
United States District Judge
United States Court House
Foley Square
New York, New York 10007

RE: *E.E.O.C and City of New York*
v.

Local 28 Et al, 71 Civ. 2877 (HFW)

Dear Judge Werker:

In accordance with the schedule established by Mr. Raff in the referenced case, the City hereby sets forth its objections to the proposed Affirmative Action Program as submitted by the Administrator.

1. Paragraph 2:

The City proposes that all pensioners be considered as union members for purposes of measuring compliance with the Program's goals for non-whites and not merely those pensioners who worked in the previous three year period. The union estimates there are currently 753 pensioners, one of whom is believed to be non-white.

Pensioners have the right to vote at union meetings, including election meetings. They thereby have an impact upon the selection of union leadership and the determination of union policy. While they are not fined for failure to vote in a union election, as are non-pensioner members, their vote carries as much weight as that of other members. Moreover, union policy is not made only at election meetings. Mr. Egen indicted, for example, that he was required to obtain membership approval for commencing the advertising campaign ordered by the Court. Further, it is common knowledge that "voluntary" assessments for legal fees, political endorsements and contributions, and similar matters, are voted on at union meetings. In addition, testimony at the trial reflected that a myriad of Executive Board proposals require ratification by a vote of the membership. This right of participation laudable as it is, necessarily dilutes the impact of the non-whites upon union policy. These considerations, as well as the right of pensioners to rejoin the active work force, requires that this group as a whole be considered "members" against which the achievement of goals is to be measured.

Therefore, the City proposes that the words "who have been employed as sheet metal workers within the last three years" be deleted.

2. Paragraph 10:

The City proposes that an additional sentence be added after the un-numbered paragraph at the top of page 8, as follows:

"Recently registered" means that the apprentice class in which the person was registered at the time he left the program, has not yet been graduated.

3. Paragraph 17:

The payment of \$100 toward the initiation fee plus three months dues (currently \$20 per month) places an untold burden upon non-whites who, as the Court found, have long been denied union admission and, therefore, work opportunity. This is a particular hardship since the \$160 is required to be paid before the individual has earned any wages. The City was intimately involved in the recruitment of applicants for the October 11 test through the Recruitment and Training Program, Inc., a nationally recognized minority organization pre-eminent in the field of construction trades recruitment and funded by the United States Department of Labor for this purpose. Seventeen non-white individuals required R.T.P. grants to cover the \$25 (non-fundable) filing fee. However, such grants are problematical when the amount is of the magnitude of \$160, and many applicants who were discouraged from even applying because of the \$25 fee will be lost to the Program by the prospect of having to lay out such a large amount of money (See attached Roffle affidavit).

Since the proposed program delays for only 30 days a final determination by the Administrator, the City believes that 1/24 of the current initiation fee, or \$56 plus one month's dues in advance is all that should be required. We therefore propose changing "\$100 and three months dues" to "\$56 and one month's dues" which represents a major commitment for a non-white who has spent enough time in the trade to qualify as a journeyman but for the first time is being given the opportunity to join the union.

4. Paragraph 30:

The City strongly objects to the omission in this paragraph of a floor on the non-white to white ratio which the parties (or the Administrator) will establish. There must be a minimum ration below which there is no discretion, else the subject will be a matter of debate each year, leading to objections, motions and appeals and consequent delays in the implementation of the Program. A floor is established for the ratio of admission of journeymen (paragraphs 7 and 14) and should similarly be established for apprentices.

Further, the City objects to the language limiting the percentage of non-white apprentices to 60% of the total apprentice program and 70% of any class or term. The apprentice program will be a major source of entry to the union for non-whites. There are eight apprentice classes and it is anticipated that in the early stages of the Program the non-whites will be more heavily represented in the early grades than the later grades. It is conceivable that any given class might have to be non-white in greater percentages than those proposed, particularly if there is a deficit in the goals of the previous period. Moreover, the apprenticeship program was 100% white for over 50 years; it is difficult to justify an objection to an occasional predominantly non-white class following this history of total exclusion. In addition, the City believes

it inappropriate for an affirmative action program which is premised on findings of discrimination against non-whites to contain quantitative maximums on the relief afforded them.

The City therefore proposes that paragraph 30 be amended to delete the last sentence and to insert a new sentence after the first sentence, as follows:

"This ratio will be established with the purpose of fairly implementing the interim and final goals set forth in Paragraphs 1 and 2 but in no event shall said ratio be less than one-to-one."

5. Paragraph 32:

The City rejects the proposal that the cost of physical examination must be borne by successful applicants. This is a dramatic departure from previous practice of the JAC, which heretofore paid the costs of the physical exam. It would be most ironic if, as a result of civil rights litigation, apprentices were for the first time required to pay for their own physical examination, and this on top of a 50% increase in the filing fee over previous years. While the physical examination certainly produces a social benefit, in this case it is primarily for the benefit of the JAC which should, as in the past, bear the cost.

Moreover, JAC will require the examination to be taken at a designated private examining service which will charge \$34 per applicant. JAC utilizes this service because it tests for drug presence as well as offering what JAC believes to be a quality physical. There has been no showing by JAC that a similar examination is not available at a lesser cost. In fact, recent inquiry made by the City through R.T.P. has ascertained the availability of quality physicals with a drug-presence component at a substantially lower cost. (See attached Ross affidavit). Moreover, the applicant should be free to be examined by any licensed physician so long as the examination establishes his physical fitness for sheet metal work and to obtain that service at a cost that is not pre-established by the JAC's arrangement with a private concern.

The City proposes, therefore, that the second sentence of paragraph 32 be amended so that "JAC" is substituted for "successful applicants." In the alternative, the City proposes a new second sentence, as follows:

"Successful applicants must produce proof satisfactory to the JAC of a recent medical examination establishing their physical fitness for sheet metal work and containing a statement as to the presence or absence of drugs. A successful applicant electing to utilize a JAC-recommended medical facility may do so at no charge to the applicant."

6. Paragraph 36:

The City believes that this provision is inappropriate for inclusion in an affirmative action program. The JAC is free to take any actions it is empowered to take and this Program does not preclude such actions. We note that a similar provision included in the last previous draft, relating to procedures established by paragraph 16, has been omitted by the Administrator in this proposal. We believe that paragraph 36 was included by inadvertence and, in any event, has no place in this Program.

7. Paragraph 39(d):

The City feels that it is necessary that JAC make diligent efforts to locate non-white apprentices who leave the program by other than action of JAC. Our experience in other construction trades indicates the existence of harassment of non-whites by fellow employees, which has led qualified men to leave the trade. Further, misunderstandings and failure of communication is a common problem. The City Commission on Human Rights has found that exit interviews where possible, are a valuable technique for avoiding such difficulties. In any event, the information derived from this type of follow up can be of great value to JAC in minimizing turnover and in assuring the most effective administration of the apprentice program. Moreover, Mr. Rothberg has indicated that efforts are, in fact, made to contact these individuals. It should be no burden to record these efforts and their results. We propose replacement of the words "if known by JAC" with "as ascertained by an exit interview diligently attempted."

8. Paragraph 45 (a):

The City proposes the deletion of paragraph 45(a) and the substitution of the following:

"The Administrator shall make final determinations in the event of a dispute relating to the operation of the Order and Judgment and of this Program, arising between the parties, between an individual and the union, between an individual and the JAC, and between an individual and a contractor. His authority shall include, but not be limited to the resolution of disputes regarding:

- (i) maintenance, availability and production of documents;
- (ii) frequency of the apprentice or journeyman's tests required under this Program;
- (iii) the ratio of non-whites to whites for entry into the union and apprenticeship program;

(iv) amendment of the Program;

(v) work referrals, including but not limited to the failure of the union to refer a non-white, the failure of a contractor to accept a non-white referral or direct application for employment when there are job openings, and the layoff of any non-white workers out of job seniority for any reason save good cause shown;

(vi) the validity and/or administration of a journeyman or apprentice test;

(vii) eligibility to take a journeyman or apprentice test, and/or refusal of appropriate appointment as a journeyman or apprentice;

(viii) amount and terms of payment of an initiation fee;

(viii) amount and terms of payment of an initiation fee;

(ix) back pay claims."

While the above, at first blush, appears redundant of the Order, it should be noted that the injunctive provisions of the order are phrased as negative prohibitions. We believe it important to establish affirmatively what is only implied in the Order concerning the Administrator's authority to monitor all practices affecting the treatment of non-whites and the equitable distribution of work opportunities. For example, paragraph 44 of the Program, absent the language proposed above, could be read to preclude the Administrator from hearing complaints of unfair treatment of non-whites in work referral for the first year of the Program.

9. Appendix A:

The New York City Board of Education should be asterisked as "information only", since it is not a manpower source. Also, both the New York State and the United States Department of Labor, Bureau of Apprenticeship Training, should be added to the list, each with an asterisk, as appropriate agencies to receive notices of examinations. The New York State Division of Employment (Department of Labor) is incorrectly titled. It should be changed to read "New York State Department of Labor, Division of Employment".

Respectfully submitted,
W. BERNARD RICHLAND
CORPORATION COUNSEL
by (s) Beverly Gross

Beverly Gross
Assistant Corporation Counsel

CC: BY HAND
David Raff, Esq
Taggart D. Adams, Esq.
Dominick Tuminaro, Esq.
William Rothberg, Esq
Sol Bogen, Esq

REPLY OF E. E. O. C

October 15, 1975

The Honorable Henry F. Werker
 United States District Judge
 Southern District of New York
 United States Courthouse
 Foley Square
 New York, New York 10007

Re: EEOC v. Local 28
 71 Civ. 2877 (HFW)

Dear Judge Werker:

This letter will respond to the objections submitted by Local Union 28 and the City of New York to the proposed Affirmative Action Program ("AAP"). This office has not received any objections from Mr. Rothberg, co-counsel to JAC and counsel for the Contractors Association.

Local 28 Objections

Objection No. 1. The language objected to in Paragraph 1 is directed toward assuring that non-whites share equitably in opportunities for employment. That was, and is, the purpose of this lawsuit. The language is prospective and neither it nor the AAP as a whole should be limited to the specifics which may or may not be in the "record". The proposed language does not guarantee that all non-whites will be employed for an equal number of hours as whites, but it seeks a goal that opportunities for such employment will be equitably shared. Local 28's proposed language which is applicable only to undefined "current depressed conditions" is too narrow.

Objection No. 2. The establishment of interim goals is authorized by §§ 11 and 14 (e) of the Order and Judgment entered in this action on September 2, 1975 ("Order and Judgment"). The interim percentages are well-considered and moderate. Including apprentices, the union now has a non-white percentage of approximately 5%. In the first three years of the Program this percentage is to be increased by 11% and in the last three years by 13%. The largest increases are called for in the first year (from 5% to 10%) and in the sixth and last year (24% to 29%). The larger increase in the first year is based upon the fact that the present manpower level in the apprentice program is extraordinarily low and a larger number of non-whites should be entering the union through the journeyman's test and the four years experience requirement (see discussion *infra*).

The definition of pensioners was left for formulation in the Program (§11, Order & Judgment). We believe the formulation contained in the proposal before Your Honor is a fair compromise reasonably calculated to attain the purpose sought. Initially, it should be noted that this definition affects only the calculation of the interim and final goals. We believe it would be unfair to include all pensioners in the calculation since many might not have been part of an active work force for many years and may no longer even reside in the area. However, as pointed out by the City of New York, these pensioners are voting members of the union and have the power to affect union policies and programs. Furthermore, pensioners can become part of the active work force at will. Therefore, we believe the three year definition which reduces the number of pensioners calculated in the percentage by 70% is fair.

Objection No. 3. The provision making membership in the union available to individuals with experience in the industry is a necessary and viable admission procedure which is authorized by Paragraph 22 of the Order and Judgment. The criteria set out in Paragraph 22 for implementing the provisions contained therein include:

- a) furthering the goal of achieving non-white membership of 29% in Local 28;
- b) restoring non-whites to positions which would have been available absent discrimination;
- c) other relevant circumstances.

We believe that the parties and the Administrator have fully considered the criteria at the numerous and lengthy conferences held during the development of the AAP. We see the rationale for the inclusion of an experience avenue as being an additional means of entry into the union of *qualified* non-whites in order to reach the 29% goal. We do not believe that the only way to test qualifications is through a "hands-on" test. In our view, four years of sheet-metal experience, as reviewed by a qualified board of examiners, is a reasonable means of qualification. Furthermore, such experience indicates an exposure to and genuine interest in the trade. It may also mean that such persons have indeed been subject to past discriminatory practices on the part of Local 28 or the JAC.

The proposed three member examining board is a compromise. Originally it was proposed that the board consist of representatives of Local 28, the Contractors, and the Administrator. When the Contractors objected to participating in such a program, a representative of the plaintiffs was substituted. In this regard, we do not think that the subjective evaluation of a sheetmetal project should be left entirely to the discretion of the defendant union. See opinion, p. 480 and n. 16.

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In Objection 3C Local 28 again raises the difference between construction sheetmetal and other sheetmetal. This was effectively disposed of by the Court in its Opinion at pp. 482-484

In Objection 3D Local 28 confuses the means of developing a "relevant labor force" for the purposes of establishing a goal percentage with an implied residence requirement. Such a requirement limited to New York City would be illogical in the face of the fact that many present Local 28 officers and members live outside the city. We believe the 60-day requirement is ample protection against the feared "influx".

Local 28's Objection 3E seems misdirected. The parties and the Administrator have been careful to assure that avenues of entry to immediate union membership be opened only to qualified persons. The age 26 itself does not seem to be a prerequisite for a qualified sheetmetal worker. Under Local 28's suggestion a person with *four year's* experience would still have to join the apprentice program.

We accept the proposal contained in Objection 3F.

Objection No. 4 In our letter of October 10, we outlined the objections of the EEOC to Paragraphs 33-36 of the AAP; however, we noted our support for the general concept. The parties and the Administrator gave careful consideration to this concept before its adoption. Essentially, we believe that prior experience in sheetmetal work (though not enough to immediately qualify an individual for journeyman status) is indicative of interest and possible past discrimination and should be accorded appropriate weight. The advanced apprentice concept is founded on a strong belief that the apprentice program is a valuable and legitimate means of assuring entry into the union. We do not propose to bypass it. Rather we seek to measure an applicant's relevant experience and place those who do not require the first term apprentice training in an upper term.

We agree with the Objection 4D.

Objection No. 5. On the whole we think this objection is mooted by the fact that only 36 persons (17 non-white) passed the journeyman's test on October 11, 1975.

Objection No. 6. We do not accept Local 28's unsupported "estimate" of \$40-50,000 as the cost of conducting the recent journeyman's test. Whatever the actual cost of that test, we also expect that the arrangements and advertising for a second journeyman's test will be far less involved and expensive. A regular schedule of journeyman's tests has merit and should be authorized. The proposed AAP provides adequate flexibility for timing the journeyman's tests according to needs.

Objection No. 7. Previously discussed. See Local 28 Objection No. 3, *supra*.

Objection No. 8. We agree that proposed Paragraph 11 omits certain necessary provisions. The last two lines of ¶11(a) should read:

"Opportunity Commission) record of convictions, citizenship or alien status, length of residence, and previous sheet metal experience"

Objection No. 9. There is no persuasive reason behind the argument that the applicants should fully subsidize the cost of the journeyman's test. An application fee in excess of \$25.00 would seriously reduce the number of non-whites applications. See City of New York letter of October 10 and enclosure.

Objection No. 10. See comments on Local 28's Objection No. 3, *supra*.

Objection No. 11. The paragraph objected to is, very simply, an essential part of an AAP. To say that we do not know the numbers is to state the obvious. To employ that fact as a reason for not developing a Program is to ignore the reason for such a Program. Local 28 would prefer day-to-day negotiations. The EEOC, realizing that amendments are always possible, and often the wisest way to deal with problems in the future, prefers not to negotiate daily but to set some concrete guidelines which can be amended if and when a need to do so has been demonstrated.

Objection No. 12. Objection 12A is based on previous objections already discussed. Objection 12B is accepted.

Objection No. 13. We believe that the optional deferral program is an essential element of the Program because it provides persons eligible for union membership with a reasonable degree of flexibility in timing their entry into the union. Journeyman's tests occur when the parties and the Administrator decide they should occur; that time may not coincide with a person's individual circumstances. Since union membership is not a guarantee of employment, we believe that an eligible applicant should be entitled to arrange his entry into the union with a minimum disruption to his own life. In this regard, it should be noted that Local 28 has not shown that this option will be in any way prejudice the union or its members.

The deferral option is not available to those who seek admission on the basis of experience since they may seek admission at any time.

Objection No. 14. Paragraphs 22 and 30 of the AAP establish two essential foundations of the AAP. First, the apprentice program will be the main source for non-white entry into the union. Second, the apprentice program should not be an all-minority program. Assuming a 3-2 non-white to white ratio (we

prefer a 1-1 ratio) 780 non-whites will have entered apprenticeship status by July 1, 1981. This number by itself will be insufficient to reach a 29% non-white goal by 1981 even assuming a union attrition rate to 100 per year. Thus we are relying on journeyman's tests and the experienced avenue of entry to reach the required goal. A further reduction in the minimum number of apprentices would increase the necessary reliance on these other avenues of entry. Given the limited number of experienced non-white sheetmetal workers in New York City this reliance would be unwise.

The EEOC submits that the apprentice program which has historically suffered an attrition rate of approximately 25% can handle the number of apprentices required by the AAP. The fact has been confirmed by the employer members of the JAC.

Objection No. 15. The provisions contained in Paragraph 23 are designed to provide adequate flexibility so that apprentices can enjoy the fullest possible employment. If, as we believe, the apprentice program is to be the most important avenue of entry to union membership it should provide the greatest possible opportunities for employment to its members.

Objection No. 16. The substance of Objection 16(a) has been previously discussed. We accept Objection 16(b).

Objection No. 17. See our comments to the City's Objection No. 5

Objection No. 18. We agree.

Objection No. 19. The position of the EEOC is that the establishment of an appropriate ratio should be done *before* the scores on the tests are known. This would eliminate any appearance of impropriety in establishing the ratio.

Objection No. 20. The establishment of two lists is essential to identifying and granting an admission preference to non-whites. Such lists, of course, do not alter the scores of the applicants.

Objection No. 21. Local 28's suggested limitation of the recordkeeping requirements to requests or inquiries made in person or in writing is unnecessarily restrictive. To the extent that other types of contacts are made with Local 28 they should be recorded. Obviously Local 28 can only record the information it receives. With regard to Objections 21D and E these requirements cover requests for permits or other general requests and they should be retained.

The three month requirement is generally part of Paragraph 21 of the Order and Judgment.

Objection No. 22 We agree with this objection.

City of New York's Objections

Objection No. 1. See our comments to Local 28's Objection No. 2.

Objection No. 2. We do not oppose this suggestion although we think this definition might be left flexible.

Objection No. 3. The AAP provision was the product of compromise among the parties. While granting the force of the City's argument, we feel that the AAP provision is equitable.

Objection No. 4. We believe that the circumstances should dictate the ratio and there is no need for a floor.

Objection No. 5. The AAP provision in question was the product of compromise. The EEOC suggested that in order to reduce the fee charged to all applicants the physical examination fee should be paid by those who have scored high enough to be admitted into the program. JAC originally proposed a fee of \$27.00 per applicant. Through suggestions like the above we have reduced it to \$15.00. We believe the provision is reasonable.

Objection No. 6. Paragraph 36, while unnecessary, is acceptable to the EEOC.

Objection No. 7. We believe the AAP provision is acceptable.

Objection No. 8. In light of the provisions of the Order and Judgment we think the City's objection is unnecessary.

Objection No. 9. This objection and proposal is acceptable.

Very truly yours,

PAUL J. CURRAN
United States Attorney
By: (s) Taggart D. Adams
TAGGART D. ADAMS
Assistant United States Attorney
Telephone No.: (212) 791-0051

cc: David A. Raff
Room 220
49-51 Chambers Street
New York, New York

Sol Bogen
One Penn Plaza
New York, New York

Rosenthal & Goldhaber
44 Court Street
Brooklyn, New York
Att.: William Rothberg

cc: W. Bernard Richland
Corporation Counsel
Municipal Building
New York, New York
Att.: Beverly Gross

Louis Lefkowitz
Attorney General
Two World Trade Center
New York, New York
Att.: Dominick Tuminaro

REPLY OF JAC

October 14, 1975

The Honorable Henry F. Werker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: EEOC vs. Local 28
71 Civ. 2877

Dear Judge Werker:

I write to set forth comments on behalf of my client to the objections interposed by the City of New York to the Affirmative Action Plan submitted by the Administrator.

Paragraph 30— There is no need to establish a minimum ratio. This paragraph clearly sets forth the procedure wherein it allows the Administrator to establish the ratio if the parties cannot agree. There need not be a particular ratio established as a minimum in advance. There are many factors which must be considered, such as the attrition rate of Local 28, the number of

minorities who enter journeyman status through the examination, etc. Before a ratio can be determined which would best implement the goals of the Affirmative Action Program, it is best to evaluate these factors on a regular and continuing basis rather than set a minimum ratio.

I would support the comments of the United States Attorney in connection with the second aspect of this paragraph, wherein he proposes additional language clarifying the purpose of the paragraph.

Paragraph 32 – A physical examination is an important requirement for entering the sheet metal trade. Apprentices work at great heights in high rise constructions, with power tools and machinery, and with fellow workers. Any disabilities which are not detected could seriously endanger the apprentice as well as his fellow worker. It is for this reason that the JAC requires a thorough physical examination by a competent health organization. We have worked with Executive Health, Inc. who have met the needs and requirements of our industry in this regard.

We do not look to have the cost become a barrier for admission to the JAC and this was so indicated by the JAC in discussions with the parties and the Administrator in connection with the development of the program. We stated that any applicant who was not able to pay the physical examination fee at the time the examination is given, could have said payment deferred. In practice, in this situation, the JAC would pay the fee for such applicant and would have the applicant reimburse the JAC over a period of time after the applicant has commenced employment. We do not see this as any hardship or burden.

We are all well aware of the deficiency in medical care available to the poor and would strongly question the thoroughness of a physical examination for which there is only a \$3.00 fee. Accordingly, it is important that the JAC have control over the extent of the physical examination and would be opposed to having applicants provide various and sundry certificates.

Paragraph 36 – We would object to the deletion of this paragraph from the Program. Its inclusion clarifies an area and avoids potential conflict in the future.

Paragraph 39 (d) – We feel that the language of the Plan as proposed by the Administrator is more than adequate to meet the needs of the Plaintiff. Practice has shown that most apprentices leave the program without giving any notice, either to the JAC or their employer. The JAC becomes aware of such action only when notified that the apprentice has not reported to work for some period of time. Attempts then made by the JAC to locate the apprentice have generally been futile. To impose an affirmative burden on the JAC to conduct exit interviews where practices indicated, this would not be possible, and would serve no useful purpose.

Paragraph 45 (a) – I would strongly oppose the language proposed by the City in this regard. The Administrator's language is broad and all encompassing and gives him the authority to decide any questions of interpretation and claims of violations of the order, judgment and program. It further sets forth that he can act on his own initiative or at the request of any party or interested person. It would seem that this language would more than meet the needs of the City.

More specifically, the City includes in subparagraph V, an item which is not part of many of the aforementioned documents, namely the establishment of job seniority. This goes well beyond the scope of the aforementioned documents. The employers, as party defendants, have an obligation to see that the minorities do not bear a disproportionate burden of the unemployment. This need not be done through a system of job seniority which has never been the practice in the industry.

It would also seem that enumeration of specific items could be construed to limit the authority of the Administrator wherein the general language as submitted by the Administrator would be all encompassing.

I have no objection to comment # 3 as submitted by the United States Attorney which concerns itself with the program for advanced apprentices.

Very truly yours,

(s) William Rothberg
William Rothberg

ph

c.c. David Raff, Esq.
Taggart D. Adams, Esq.
Dominick Tuminaro, Esq.
Sol Bogen, Esq.
Beverly Gross, Esq.

REPLY OF NEW YORK CITY

October 15, 1975

Hon. Henry F. Werker
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Re: *E.E.O.C. and City of New York*

v.

Local 28 71 Civ. 2877 (HFW)

Dear Judge Werker:

In accordance with the schedule established by Mr. Raff, this letter constitutes the City's reply to the objections raised by the United States and Local 28 to the Administrator's proposed Affirmative Action Program:

1. E.E.O.C.'s objections:

- a) We agree with the proposal that there be a refund of dues to conditional members who do not become regular members. However, dues refunds should only be required for months in which the conditional member did not work. Moreover, any portion of the initiation fee paid during conditional membership by an individual who is unable to become a regular member should also be refunded, if the individual did not commence work.

Therefore we propose the following language to be added at the end of Paragraph 17:

"If a conditional member is terminated without becoming a regular journeyman member of Local 28 he shall be entitled to a return of any dues paid in advance for any month in which he was not employed and, if he was not employed during his conditional membership, he shall also be entitled to a return of any payment made toward the initiation fee."

- b) Paragraphs 33 through 36 as submitted by the Administrator reflects a program worked out between the City and counsel for the employers. The purpose is to avoid the necessity for testing applicants for advanced standing who have more than one year experience as determined by JAC's Training Coordinator. It was agreed between the employers and the City, and E.E.O.C.'s proposal also recognizes, that testing of these individuals is unnecessary. The purpose of sharing non-white apprentice appointments between advanced and entry-level applicants is to avoid the divisiveness and conflict that might arise if there were no fixed system for admitting apprentice applicants who have more than one year experience and who therefore can become journeymen in less than four years. The City is aware of large numbers who may be qualified by experience to be immediately placed with advanced

standing, as was done under the 1974 interim orders of Judge Gurfain, including individuals who fail to qualify as full journeymen on the October 11 examination. The placement of such individuals should be specifically provided for in the Program.

It should be noted that Paragraph 35(a) does not contemplate or permit the admission of a lower-ranking non-white over a higher ranked non-white. Indeed, the opposite is provided but possibly requires clarification, which could be accomplished by inserting the words "in accordance with Paragraph 31(b)" after the words "acceptance into the apprenticeship program" on line 5 of paragraph 35(a).

2. Local 28's objections:

- a) Objection # 1: Title VII is an equal employment opportunity statute and the effectiveness of the program herein will ultimately be measured by reference to the equitable sharing by non-whites of employment opportunities available to Local 28 members. The union proposal does not express the purposes either of this suit or of the Program ordered by the Court to be established.
- b) Objection # 2:
 - A. Paragraphs 11 and 14(e) of the Court's Order and Judgment specifically provide for the establishment of interim goals to assure "regular and substantial" annual progress toward the final goals of 29%.
 - B. Local 28, which has virtually excluded non-whites, should be required to make a dramatic showing of the reversal of historic patterns in the beginning years of this Program. Non-whites should be in a position to compete for available employment by being admitted to membership in annual percentages that reflect an equitable opportunity to an equitable share of the work that exists. Lesser percentages than those proposed will unreasonably reduce the potential for minority employment, unfairly continue the preference given white members, and make unlikely the attainment of the long range-goal of this Program.
 - C. The City's proposal is stated in our proposal of October 10.
- c) Objection # 3:
 - A. The provision for admission on the basis of four years' experience is necessary to be included in the Program from the outset to obviate continual amendment. It should be noted that the timing and conditions of admission are left to the Administrator. Since less than 100

minority individuals took the October 11th test, this vehicle for admission must appear in the Program so that it can be readily utilized.

- B. The precedent for a tri-partite Examining Board is firmly established (e. g., *Rios v. Local 638*) and, we believe, is absolutely necessary, based upon the miniscule number of minority individuals in the union. An impartial Board will insure an objective evaluation of an individual's qualifications, and the existence of such a Board will aid to preserve the integrity of the Court's Order and Judgment.
- D. It is inconsistent to impose a New York City residency requirement on incoming members where none exists for present members, many of whom, in fact, do not reside in the City.
- E. A survey made and reported on by the City in the course of the meetings of the parties reveals that minimum age requirements do not exist in the vast majority of building trades. The ability to perform journeyman's work is the essential criterion. The age "22" takes into account that apprentices may commence the apprenticeship program at age 18 and become journeyman four years later.

d) Objection # 4:

- A. We note here that Local 28 advocates the deferral of each proposed system of admission until the results are known of the others, thus assuring the non-implementation of any. It is not premature to establish a program of admission to apprenticeship with advanced standing for non-whites, because the pool of qualified minority journeymen is limited. Therefore, the apprenticeship program will provide the major route for participation by non-white individuals, and there is a need to immediately accommodate those who should not be required to spend four more years achieving journeyman status when they already have previous trade experience. Further, since Mayoral Executive Orders require the employment of minority individuals as "trainees", the implementation of a Program for advanced apprentices may avoid the kind of situation which led to the contempt proceedings in this case in 1974.
- B. It is unnecessary to subject to an aptitude test individuals who have established to the satisfaction of the Training Coordinator that they possess more than one year's experience in the trade.
- C. Since the total number of apprentices is not "entirely unknown at this time" (see Paragraph 22 of Administrator's proposal), it is possible for the inclusion of specific proportions of advanced apprentices within the total of non-white apprentices to be admitted.

- e) *Objection # 5:* Without getting on the Local 28 merry-go-round as to whether the journeymen's admissions should be deferred until the apprentice results are known, and vice versa, Local 28's comments are no longer valid since it is now known that less than 100 non-white individuals took the October 11th test and those successful is expected to be less.
- f) *Objection #6:* According to preliminary reports, only about sixteen minority individuals who took the October 11th test received a passing grade. This small number of new minority journeymen will have no impact on the membership or employment profile of Local 28 members, particularly since more white individuals passed the test than did minority individuals. There is a clear need for journeyman's tests to be conducted at least once a year in order to maximize the flow of qualified minority journeymen into the union. With adequate lead time, which we did not have for the October 11th test, publicity and other costs could be sharply reduced. Figures estimated by Local 28 are questionable.
- g) *Objection #8:* The application form submitted by Local 28 was adopted for the October 11th test only and should not now be adopted as a standardized form for future tests. It is unduly long and burdensome (i.e., medical information unnecessary because medical certificate is required) and the general information more properly belongs in a separate fact sheet reflecting current circumstances (as is being done by JAC for the December test). Local 28's standard application form was never this detailed in prior years, and new application forms should include only that information determined by the parties or the Administrator to be relevant at the time used.
- h) *Objection #10:* See comment (c) above.
It is important that the minority community perceive the entire testing process as impartial. A union-only Examining Board creates a contrary appearance and, thus, a negative testing environment for non-whites.
- i) *Objection # 11:* As stated in the City's letter of October 10th, a minimum ratio must be established in the Program else the subject will be a matter of debate each year, leading to objections, motions and appeals and consequent delay. Given the results of the October 11th test, in which more whites than minorities were passed, such minimums are clearly essential to assure the admission of a maximum of qualified minorities.
- j) *Objection #12:*
 - A. The application of paragraphs 16 and 17 of the Administrator's proposal will, in fact, only to journeyman admitted with four year's experience and to advanced apprentices after these methods of entry are approved by the Court. Paragraph 22(d) of the Order and Judgment specifically applies paragraphs 16 and 17 of the Program to these

two groups of incoming journeymen.

- B. We believe such provision is inappropriate for inclusion in an affirmative action program and, in any event, the Executive Board may take this action with or without such provision.
- k) *Objection #13*: It should be made clear at the outset that the Program contemplates the utilization of every available method permitted under the Order and Judgment by which the entry of non-whites to the union can be expedited. It is far better to include all these provisions at the outset than to constantly attempt to amend the Program.
- l) *Objection #14*: After the June, 1976 class graduates, there will be less than 100 apprentices of all races in the apprenticeship program. The number of apprentices to be admitted, i.e., 300 by June, 1976 and 200 per annum thereafter, will restore the apprenticeship program to approximately its traditional size. Local 28's objection erroneously states that deferring the decision as to numbers, until after the results are known, will permit such decision to be knowledgeably made. However, the apprentice exam produces a ranked list only and so does not bear on the question of how many should be admitted to the apprentice program.

The thrust of Local 28's argument is that the number of apprentices should be decided by collective bargaining, which is subject to arbitration. Clearly, such a procedure is unacceptable as a Title VII remedy after an adjudication of discrimination. It also creates a monstrosity of overlapping jurisdiction of the arbitrator, the Administrator and the Court. Overwhelming Title VII precedent rejects such a mechanism.

m) *Objection #15*:

- A. The union's objection ignores the plain language of the Administrator's paragraph 23, which measures the ratio of employed apprentices to the *aggregate* of employed journeymen and not to site-by-site numbers.
- B. Counsel for the employers confirmed at one of the drafting meetings that JAC's policy to place upper termers first and to lay them off last results in the placement of fewer apprentices than is possible if seniority amongst apprentices were not relied on. Since the lower grades are expected to reflect a larger number of minority apprentices than the upper grades, at least for the first years of this Program, it is obligatory to expand opportunities for them to receive the on-the-job training that constitutes the bulk of apprentice training. Rotation of apprentices is another device for expanding work opportunities, in which the employers also concur.

- n) *Objection #19*: The union correctly points out the inconsistency of procedures relating to the establishment of ratios, but proposes an inappropriate adjustment since the examination itself produces only a ranked list with no pass-fail cutoff. The decision as to ratios should, in all cases, be made prior to the giving of the examination in order to insure that it is made dispassionately to effectuate the Order and Judgment and to facilitate an intelligent recruitment campaign.
- o) *Objection #20*: It is important to grant the Court-ordered preference in favor of non-whites for admission into the apprenticeship program unless a method of racial identification and selection is established. Since the examination will produce a list of ranked candidates, from which a predetermined number and ratio will be appointed, there is no reason to delay a determination of the selection method to be utilized.
- p) *Objection # 21*:
F. and H. *Objection 21 F* is derived from the Order and Judgment paragraph 21(e)(xii), and its deletion would require modification of the Order. Moreover, the information is presently readily available, as each employer is required to furnish the various welfare funds with current data as to individual members employed and the number of hours worked. The union trustees have access to these records and it is not a substantial burden to copy and forward them. Sharing of this existing information is essential to a proper implementation of the Program. Quarterly reports, (*Objection 21 H*), as required by the Order, are necessary for most effective monitoring: semi-annual information will not be sufficiently timely.

Respectfully submitted,
W. Bernard Richland
Corporation Counsel

by (s) Beverly Gross
Assistant Corporation Counsel

CC: BY HAND

Taggart B. Adams, Esq.
Dominick Tuminaro, Esq.
William Rothberg, Esq.
Sol Bogen, Esq.
David Raff, Esq.

ORDER AND JUDGMENT
71 CIV. 2877 (HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP
COMMITTEE, . . . SHEET METAL AND AIR-CONDITIONING
CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs shall have judgment against defendants as follows:

A. GENERAL EQUITABLE RELIEF

1. Defendant Local 28 of the Sheet Metal Workers International Association, its officers, agents, employees and successors and all persons in active concert or participation with them in the administration of the affairs of Local 28 ("Local 28") are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating in recruitment, selection, training, admission to membership in Local 28, admission to membership in the Local 28 Apprentice Program (the "Apprentice Program") indenturing apprentices, referral, advancement, compensation terms, conditions, or privileges of employment against any individual or class of individuals on the basis of race, color or national origin. Local 28 shall not exclude or expel any individual from membership in Local 28 or the Apprentice Program, or limit, segregate or classify members in Local 28 or the Apprentice Program, or fail or refuse to refer any individual for employment with sheet metal contractors, their agents, subsidiaries or successors with whom Local 28 presently has, or shall have in the future, a collective bargaining agreement ("Local 28 contractors") on the basis of race, color or national origin, nor shall they take any other action which would deprive or tend to deprive any

individual of employment opportunities with Local 28 contractors or membership in Local 28 or the Apprentice Program, or otherwise adversely affect his or her status as an employee of Local 28 contractors or member of Local 28 of the Apprentice Program, or as an applicant for employment with Local 28 contractors or membership in Local 28 or the Apprentice Program because of such individual's race, color or national origin. They shall receive and process applications for membership in Local 28 and the Apprentice Program, admit members to Local 28 and the Apprentice Program, indenture apprentices, train, test, offer journey status to graduate apprentices, refer for employment, handle grievances, and otherwise administer all of the affairs of Local 28 and the Apprentice Program so as to ensure that no individual is excluded from equal work opportunities, including but not limited to overtime and advancement, on the basis of race, color or national origin.

2. Defendant Local 28 is permanently enjoined from preventing, impairing, obstructing, delaying or otherwise interfering with Defendant Sheet Metal and Air-conditioning Contractors National Association, New York City Chapter, Inc. (the "Contractors Association") and/or all Local 28 contractors from fulfilling the affirmative action obligations imposed on them or any of them by Presidential Executive Order 11246, 3 C.F.R. Chapter IV §202, and Mayor Executive Order 71, dated April 2, 1968, 96 The City Record 2842 (April 10, 1968) and rules and regulations thereunder.

3. Except as otherwise provided in this Order and Judgment ("Order"), defendant Local 28, is permanently enjoined from denying, withholding, discouraging, obstructing or otherwise interfering with direct access by non-whites* to membership in Local 28 by failing to administer at least once a year a journeyman's test and by using as journeyman tests examinations not professionally developed and valid under the Equal Employment Opportunity Commission Guidelines on Employee

* Hereinafter, the term "non-white" shall mean black and Spanish surnamed individuals.

Selection Procedures, 29 C.F.R. Part 1607 ("EEOC Guidelines").

4. Defendant Local 28 is permanently enjoined from denying, withholding, discouraging, obstructing or otherwise interfering with direct access by non-whites to membership in Local 28 or the Apprentice Program by selective organizing non-union sheet metal shops with few, if any, non-white sheet metal employees, and/or by admitting into Local 28 or the Apprentice Program from such non-union shops only white sheet metal employees.

5. Defendant Local 28 is permanently enjoined from denying, withholding, discouraging, obstructing or otherwise interfering with direct access by non-whites to membership in Local 28 by accepting transfers of white members or apprentices of affiliated sister local unions while refusing transfers of non-white members or apprentices of affiliated sister local unions, and/or by only accepting transfers of those individuals who formerly were members and/or apprentices of Local 28.

6. Defendant Local 28 is permanently enjoined from denying, withholding, discouraging, obstructing or otherwise interfering with direct access by non-whites to membership in Local 28 by relying on, using a system of, or issuing "identification slips" or "permits" to white members and/or apprentices of affiliated sister local unions or allied construction unions.

7. Defendant Contractors Association, its officers, agents, employees, members and successors, and all persons in active concert or participation with them, are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating in recruitment, selection, training, admission to membership in Local 28, admission to membership in the Apprentice Program, indenturing apprentices, referral, advancement, compensation, terms, conditions or privileges of employment against any individual or class of individuals on the basis of race, color or national origin. They shall not fail or refuse to hire for employment, nor shall they fail or refuse to refer for membership, or advise of membership opportunities, in Local 28

or the Apprentice Program any individual on the basis of race, color or national origin, nor shall they take any other action which would deprive or tend to deprive any individual of equal employment opportunities with a Local 28 contractor or otherwise adversely affect such individuals' status as an employee of a Local 28 contractor or as a member of Local 28 or the Apprentice Program because of such individual's race, color or national origin.

8. Defendant Local 28 Joint Apprenticeship Committee, its trustees, officers, agents, employees, and successors, and all persons in active concert and participation with them in administering the affairs of the Apprentice Program ("JAC") are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating in recruitment, selection, training, admission to membership in the Apprentice Program, indenturing apprentices, admission to membership in Local 28, referral, advancement, graduation, compensation, terms, conditions or privileges of employment against any individual or class of individuals on the basis of race, color or national origin. JAC shall receive and process applications for the Apprenticeship Program, admit, indenture, train, test, refer for employment with a Local 28 contractor, advance and graduate apprentices, and otherwise administer the Apprentice Program so as to ensure that no individual or class of individuals is excluded from equal work opportunities with a Local 28 contractor on the basis of race, color or national origin.

9. Except as specifically set forth in paragraph 21(c) *infra*, defendant JAC, is permanently enjoined from administering all unvalidated tests, including but not limited to the battery of tests, and all unvalidated variations thereof, set forth in the Corrected Fifth Draft of Standards For Admission of Apprentices for the Sheetmetal Industry of New York City, New York ("Corrected Fifth Draft") which is appended to the opinion and order of the Supreme Court of the State of New York, County of New York, in the case *State Commission on Human Rights v. Mell Farrell*, 43 Misc. 2d 958, 252 N.Y.S. 2d 649 (Sup. Ct. N.Y. City 1964).

10. Defendant JAC is permanently enjoined from requiring a high school diploma or equivalency certificate or other indicia of

completion of twelfth grade as a prerequisite to taking the apprentice entrance test, or admission to the Apprentice Program.

B. REMEDIAL RACIAL GOAL

11. By July 1, 1981, Local 28 and JAC are hereby directed and ordered to achieve a non-white percentage of 29% in the combined membership of Local 28, including pensioners, and the Apprentice Program. (The pensioners to be included in this computation shall be defined in the Program.) Nonwhites shall be admitted to Local 28 and the Apprentice Program in such a manner as to insure that there is regular and substantial progress made every year in achieving this goal.

12. In order to achieve this non-white percentage of 29%, Local 28 and JAC are hereby directed and ordered to forthwith grant a preference in favor of non-whites for admission into Local 28 and the Apprentice Program. The terms and conditions of this admission preference shall include, but not be limited to, the provisions set forth in paragraphs 13 through 23 *infra* and in a program of recruitment, selection, testing, record-keeping, admission, referral and employment (the "Program") which is to be developed by the parties herein and the Administrator who is appointed in paragraph 13 of this Order.

C. THE ADMINISTRATOR

13. David A. Raff, Esq. is hereby appointed Administrator to implement the provisions of this Order and the Program and to supervise the performance and implementation thereof. He shall immediately commence his duties. If the position of Administrator becomes vacant by virtue of the death or incapacity of the individual hereby appointed, the Court shall appoint a successor.

14. In addition to the powers and duties specified in this Order and the Program, the Administrator shall be empowered to take all actions, including but not limited to the following, as he deems necessary and proper to implement and insure the performance of the provisions of this Order and the Program:

- (a) establish additional record-keeping requirements;

(b) increase the frequency with which the apprentice entrance test and/or the hands-on journeyman's test described more fully *infra* are administered;

(c) devise and implement additional methods and procedures for entry by non-whites into Local 28 or the Apprentice Program;

(d) establish ratios of non-whites to whites by which individuals will be admitted to Local 28 or the Apprentice Program;

(e) establish through the Program or otherwise such interim percentage goals of non-white membership in Local 28 and/or the Apprentice Program in order to insure that the 29% goal set forth in paragraph 11 *supra* is achieved by July 1, 1981.

(f) establish procedures and practices for work referral and employment, including but not limited to work referral and employment procedures and practices based on ratios of non-whites to whites, furloughs and/or rotation;

(g) conduct an investigation into, and/or require Local 28, and/or JAC to submit reports, concerning any aspect of the operation of Local 28 and the Apprentice Program.

(h) review and approve or object to the disposition of all applications for entry into Local 28 or the Apprentice Program. At such time, if ever, that the Administrator shall adopt and implement any of the procedures and requirements authorized in this paragraph, he shall do so in writing and such procedures and requirements shall thereafter be deemed included in and part of the Program described *infra* and subject to review by the Court.

15. The Administrator shall hear and determine all complaints concerning the operation of this Order and the Program and shall decide any questions of interpretation and claims of violations of this Order and the Program, acting either on his own initiative or at the request of any party herein or any interested person. All decisions of the Administrator shall be in writing and shall be appealable to the Court.

16. Within the guidelines set forth in paragraph 23 through 25 *infra*, the Administrator shall award back pay to non-whites who file a written claim with him before January 15, 1976. The Administrator is empowered to hold hearings and make such factual determinations as he deems appropriate on all such claims for back pay.

17. At the end of three months from the date of entry of this Order, and at three month intervals thereafter up to the first anniversary, the Administrator shall submit a detailed report to the Court and the parties describing the work he has performed and the progress that has been made in working toward the percentage goal of 29% non-white membership in Local 28 and the Apprentice Program by July 1, 1981. In this report, the Administrator shall recommend such modifications, amendments or changes to this Order or the Program that he deems necessary and proper in order to meet the aforesaid percentage goal. From the first anniversary of the date of entry of this Order and thereafter until July 1, 1981, the Administrator shall submit the above described report every six months.

18. Nothing contained herein shall give the Administrator the right to amend, modify or change the substantive terms of this Order and the Program, nor shall he have any power or authority other than that granted to him in this Order and the Program.

19. The Compensation for the Administrator which shall be at a rate of \$60.-per hour and such out-of-pocket expenses as approved by the Court shall be charged upon and apportioned among the defendants as the Court may direct. The Administrator shall submit at the beginning of every calender quarter to the defendants, with a copy to the Court and counsel for the plaintiffs and the State Division of Human Rights (the "State"), a bill itemizing his compensation and the expenses that he incurred during the immediately preceeding quarter.

20. The Administrator shall remain in office for such time as the Court shall determine.

D. THE PROGRAM

21. On or before September 30, 1975, the parties herein and the Administrator shall agree on a Program designed to implement and facilitate a preference in favor of non-whites in recruitment, admission, entry, and training in Local 28 and the Apprentice Program, and to achieve by July 1, 1981, a 29% goal of non-whites in Local 28 and the Apprentice Program. The Program shall include, but not be limited to, the following provisions:

(a) Local 28 shall administer at least once a year, or more often if the Administrator shall order, a non-discriminatory hands-on journeyman's test, professionally developed and designed to test the ability of the applicant to perform duties normally required of an average sheet journeyman on a daily basis. Except as provided for in paragraph 21(b) *infra*, such tests shall be professionally developed and validated in accordance with EEOC Guidelines. Within a reasonable time before the administration of each test (which shall not be less than four weeks unless good cause is shown), Local 28 shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of the test and (ii) a copy of the test to be administered, provided that counsel for the parties and the Administrator shall not distribute or disclose the contents of the test to any individual or organization except for the purpose of professional validation thereof. No such test shall be administered without the prior written approval of the Administrator, and the Administrator shall supervise all phases of the administration of all such tests, including the grading and notification to applicants of the results thereof. In addition, the Program shall include provisions describing the application forms and procedures to be used, and within the guidelines set forth in paragraph 21(f) *infra*, establish eligibility requirements, and such other provisions as are necessary and proper to insure that the hands-on journeyman's tests are administered in a non-discriminatory manner and in furtherance of the 29% goal of non-whites in Local 28 and the Apprentice Program.

(b) The first such test described in paragraph 21(a) *supra* shall be administered in or before September 1975 and Local 28 shall immediately initiate and implement, under the supervision and direction of the Administrator, an advertising and publicity campaign designed to inform the non-white community within the City of New York that the test is to be administered and that it will be conducted and graded in a non-discriminatory manner. Local 28 shall not be required to engage media whose principal place of business is located outside the five boroughs of New York. The test to be administered pursuant to this provision shall consist of a practical examination substantially similar to the practical examination which was part of the journeyman's test administered by Local 28 on November 8, 1969, as reviewed and modified by a sheet metal expert chosen by counsel for the plaintiffs and the State and the Administrator.

(c) JAC shall administer at least once a year, or more often if the administrator shall order, a non-discriminatory apprentice entrance test consisting solely of (i) the mechanical comprehension aptitude test previously given by JAC in April, 1969, or such variations thereof which have been professionally developed and validated in accordance with EEOC Guidelines and (ii) a "read and follow directions" test to be developed professionally and validate in accordance with the EEOC Guidelines. In addition, the Program as devised by the parties and the Administrator may include upon good cause shown, a professionally developed, valid and non-discriminatory basic arithmetic test which shall become part of the apprentice entrance test. Within a reasonable time before the administration of each such test (which shall not be less than four weeks unless good cause is shown), JAC shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of each component of the apprentice entrance test to be administered and (ii) a copy of the test to be administered, provided that counsel for the parties and the Administrator shall not distribute or disclose the content of the test to any individual or organization except for the purpose of professional validation thereof. No such test shall be administered without the prior written approval of the

Administrator, and the Administrator shall supervise a phases of the administration, including the grading and notification to applicants of the results, of all such tests. In addition, the Program shall include provisions describing the application forms and procedures to be used and within the guidelines set forth in paragraph 21(f) *infra*, establishing eligibility requirements, and such other provisions as are necessary and proper to insure that the apprentice entrance tests are administered in a non-discriminatory manner and in furtherance of the 29% goal of non-whites in Local 28 and the Apprentice Program.

The first such test shall be administered in or before December 1975 and JAC shall immediately initiate and implement commencing on or before October 1, 1975 an advertising and publicity campaign designed to inform the non-white community within the City of New York that the test is to be administered and that it will be conducted and graded in a non-discriminatory manner. JAC shall not be required to engage media whose principal place of business is located outside the five boroughs of New York.

(d) Within a reasonable time, but not later than November 1, 1975, Local 28 shall replace one of the white JAC Trustees designated by it with a non-white. A non-white shall hold that position and continue to serve as a union-designated Trustee of JAC until at least July 1, 1981.

(e) In addition to any other lists or records required to be maintained by Local 28 or JAC by the terms of this Order or the Program or by order of the Administrator, either Local 28 and JAC, as the case may be shall maintain separate records and lists for whites and non-whites concerning the following matters:

(i) Whites and non-whites who request an application for or apply to take the apprentice entrance test described in paragraph 21(c) *supra*;

(ii) Whites and non-whites who request an application for or apply to take the hands-on journeyman's test described in paragraph 21(a) and 21(b) *supra*;

(iii) Whites and non-whites who take the apprentice entrance test described in paragraph 21(c) *supra*;

(iv) Whites and non-whites who take the hands-on journeyman's test described in paragraphs 21(a) and 21(b) *supra*;

(v) Whites and non-whites who pass the apprentice entrance test described in paragraph 21(c) *supra*;

(vi) Whites and non-whites who pass the hands-on journeyman's test described in paragraphs 21(a) and 21(b) *supra*;

(vii) Whites and non-whites who seek or apply to transfer into Local 28 from an affiliated sister local union;

(viii) Whites and non-whites who inquire about the possibility of transferring into Local 28 from an affiliated sister local union;

(ix) Whites and non-whites who inquire as to the availability of work opportunities with or through Local 28, including but not limited to inquiring about or seeking "permits" or "identification slips";

(x) Whites and non-whites to whom "permits or "identification slips" are issued or work opportunities with or through Local 28 are otherwise made available.

(xi) Whites and non-whites who contact Local 28 or JAC seeking sheet metal work;

(xii) Whites and non-whites who are employed as sheet metal workers by Local 28 contractors.

The records and lists specified in subsections (i) through (xii) of this paragraph shall contain the name, address, race, color or national origin, union affiliation, if any, of each individual listed therein, as well as the date of the application, test, inquiry, contact, or employment (and the name of the contractor, where applicable), and the disposition, with reasons, of each such application, test, inquiry, contact or employment. Copies of these records and lists shall be submitted to counsel for the parties herein and the

Administrator at least once every three months. (f) An individual who is a lawful permanent resident alien shall not be denied access to Local 28 or the Apprentice Program, or work opportunities within the jurisdiction of Local 28 because of such individual's alien status.

(g) Local 28 and JAC shall provide non-white journeymen and apprentices of Local 28 with the same assistance including the assistance of Local 28's officers and business agents, in obtaining employment as that provided to white members and apprentices of Local 28. Within thirty days after adoption of a Program, Local 28 and JAC shall file with the Administrator and submit to the parties a written statement describing the operation of their work referral and employment activities on behalf of the members and apprentices of Local 28. Nothing contained herein shall in any way limit the power of the Administrator to require Local 28 and/or JAC to modify, amend or change their work referral and employment activities, or institute or undertake additional procedures or activities regarding work referral or employment in order to (i) assist non-white journeymen and apprentices of Local 28 in obtaining employment or (ii) protect non-white journeymen and apprentices of Local 28 from bearing a disproportionate burden of unemployment.

(h) In order to dispel Local 28's and JAC's reputations for discrimination in non-white communities, Local 28 and JAC shall implement, under the supervision of the Administrator, a program of advertising and publicity, through the use, *inter alia*, of non-white media including newspapers and radio stations directed primarily toward non-white communities, designed to inform the non-white communities in New York City of the non-discriminatory opportunities to join Local 28 and the Apprentice Program. Such a program shall include, but not be limited to, provisions to inform the non-white communities of the specific dates and qualifications for the hands-on journeyman's test and the apprentice entrance tests, and generally of opportunities available on a non-discriminatory basis in Local 28 and the Apprentice Program. Local 28 and JAC shall not be required to engage

media whose principal place of business is located outside the five boroughs of New York.

(i) At least once a year until July 1, 1981 on a date to be set forth in the Program, Local 28 and JAC shall submit to the Administrator and the parties herein, a list of all members and apprentices of Local 28, with race identification, broken down into the following categories:

- (i) Active members;
- (ii) Pensioners; (as defined in Program)
- (iii) Apprentices.

(j) Except as modified, changed or amended by the terms of this Order, the Program or order of the Administrator, Local 28 and JAC shall not change, modify or amend any aspect of the operation or content of the Apprentice Program, or the conditions or terms upon which an individual shall become a member of the Apprentice Program or Local 28 or entitled to work within the jurisdiction of Local 28.

22. In order to further the goal of achieving non-white membership of 29% in Local 28 and the Apprentice Program by July 1, 1981 and to restore non-whites to the positions that would have been available to them absent the pattern and practice of discrimination by Local 28 and the JAC, and further, considering all relevant circumstances, the Program may include, or the Administrator may, upon notice to the parties and the Court, adopt and implement as part of the Program, the following provisions requiring Local 28 and/or JAC to take the following actions:

(a) Require Local 28 to send written notice to the members and apprentices of the Blowpipe Division, Local 400 stating that pursuant to Section 9(k) of Article 16 of the Sheet Metal Workers International Association Constitution and Ritual, such members and apprentices are entitled to transfer into Local 28 after five years in good standing with the Blowpipe Division of Local 400.

(b) Under terms and conditions to be established in the Program or by the Administrator, require Local 28 to admit as full journeyman members all non-whites who apply in writing and have four years experience as a sheet metal worker in the United States, or elsewhere, in construction or industrial sheet metal work as an employee of a union or non-union employer, or have been employed in other sheet metal work, including but not limited to: employment as a member in any branch of Local 400 of the Sheet Metal Workers International Association; sheet metal experience in the Armed Forces; or, vocational training related to the skills of a journeyman sheet metal worker.

(c) Under terms and conditions to be established in the Program or by the Administrator, require Local 28 and JAC to establish a program for the admission of non-whites with sheet metal experience into the Apprentice Program with advanced standing. A non-white admitted to the Apprentice Program with advanced standing shall be entitled to the same pay, instruction, supervision, training, employment and all other rights and privileges of any other individual in the Apprentice Program at the same level of training, and upon graduation from the Apprentice Program shall become a journeyman member of Local 28 with the same rights and privileges thereunder as any other journeyman member of Local 28.

(d) Under terms and conditions to be established in the Program or by the Administrator, require and direct that non-whites admitted to journeyman status in Local 28 through the procedures set forth in paragraphs 21(a) 21(b), 22(b) and 22(c) *supra*, shall pay an initiation in an amount not to exceed the amount of the lowest initiation fee charged to any white individual who was admitted membership at the time the non-white would have been eligible for membership in Local 28 absent Local 28's and/or JAC's discrimination, including discriminatory admission requirements, against non-whites. In addition, the Administrator may direct that payment by non-whites of the aforesaid initiation fees shall commence with their employment with a Local 28 contractor and shall be paid in such monthly installments as determined by the

Administrator. Neither the amount of the initiation fee to be paid by non-whites under this paragraph, nor the installment payment authorized hereunder, shall in any way affect the journeyman status, including but not limited to the right to secure employment with a Local 28 contractor, of the non-whites to whom this provision applies.

(e) Require and direct that persons who become qualified for journeyman membership pursuant to paragraphs 21(a) and 21(b) *supra* may, at their discretion, defer their admission into Local 28 for a reasonable period of time.

(f) Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and only on such terms and conditions as the Administrator, in his discretion, shall require, including but not limited to requiring Local 28 to first solicit the members and/or apprentices of the Blowpipe Division, Local 400 to work within the jurisdiction of Local 28 on "identification slips" or "permits" before contacting any other individual including members and/or apprentices of other affiliated sister local unions or allied building trades local unions in order to solicit such individual work on "permits" or "identification slips".

BACK PAY

23. Non-whites who file a written claim with Administrator on or before January 15, 1976, and who count with the following conditions shall be entitled to award back pay from Local 28:

(a) There is a record, of application for direct entry into Local 28, either through a journeyman's test previously administered by Local 28 or through transfer

(b) Each such non-white for whom there is record as described in paragraph 23(a) *supra* demonstrates before the Administrator, in light of this Court's conclusions in its Opinion dated July 18, 1975, that he or she was discriminatorily excluded from membership in Local 28; and

(c) Each such non-white demonstrates monetary damages suffered as a result thereof.

24. All non-whites who qualify for awards of back-pay as described in paragraph 23, shall be entitled to recover proven damages from the date the discrimination occurred through (a) July 18, 1975, the date of filing of this Court's Opinion in this action, or (b) the date of the individual's admission to Local 28, whichever is earlier.

25. Back-pay damages shall be computed on the basis of the average monthly wage earned by members of Local 28 in each of the affected calendar years and shall be adjusted to reflect other employment income or public assistance received by claimants. Payment of damages, as computed above, shall be made after determination by the Administrator of all claims and their discretionary review if necessary, by this Court.

GENERAL PROVISIONS

26. All records and lists required by this Order and the Program shall be maintained for ten years, and shall be made available for inspection and copying by the parties and the Administrator on reasonable notice during regular business hours or at other mutually convenient time without further Order of this Court.

27. At any time, any of the parties herein may apply to the Administrator and then to the Court for the purpose of seeking additional orders to insure the full and effective implementation of the terms and intent of this Order and the Program.

28. This Court shall retain jurisdiction over this action to ensure compliance with the terms of this Order and the program and to enter such additional orders may be necessary to effectuate equal employment opportunity for non-whites and other appropriate relief.

Dated: New York, New York
August 28 1975.

HENRY F. WERKER
.....
U.S.D.J.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
the City of New York, Plaintiffs

v.

LOCAL 638 et al., Defendants.

LOCAL 28, Third-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS, Third-
Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE, Fourth-
Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS, Fourth-
Party Defendant.

No. 71 Civ. 2877 (HFW)

United States District Court
S.D. New York.
July 18, 1975

United States and City of New York brought action against local union and its apprenticeship committee based on allegations of racial discrimination. The District Court, Werker, J., held that statistical evidence presented prima facie case of discrimination; that use by union and apprenticeship committee of tests which were not validated according to EEOC guidelines and which were shown to have discriminatory impact on nonwhites were violative of Civil Rights Act; that union would be required to achieve nonwhite membership comparable to percentage of nonwhites in the relevant labor market within six years; and that back pay would be awarded in cases where the persons entitled to such back pay could be identified.

Order accordingly.

Paul J. Curran, U. S. Atty., S. D. N. Y., New York City, for plaintiff United States Equal Employment Opportunity Commission; by Taggart D. Adams, Louis G. Corsi, New York City.

W. Bernard Richland, New York City Corp. Counsel, New York City, for plaintiff City of New York; by Beverly Gross, Thomas A. Trimboli, New York City.

Sol Bogen, New York City, for defendant Local 28.

Rosenthal & Goldhaber, Brooklyn, N. Y., for defendant Joint Apprenticeship Committee and Trust; by William Rothberg, Brooklyn, N. Y.

Louis J. Lefkowitz, Atty. Gen., New York City, for third and fourth-party defendant New York State Division of Human Rights; by Dominic J. Tuminaro, New York City.

OPINION

WERKER, District Judge.

This is an action filed in 1971 by the United States pursuant to § 707(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-6(a). It was originally part of a larger action against four unions in the building trades industry and their joint apprenticeship committee for engaging in a past and continuing pattern and practice of discrimination in admission and employment of non-whites.¹ Soon after issue was joined in that case separate trials were ordered for each union and its related co-defendants.² After severance of the four groups for purposes of

¹ For purposes of this case the parties have agreed that the term "non-whites" includes black and Spanish surnamed individuals. Pre-trial Order, p. 3.

² The reported decisions of those actions which have proceeded to trial can be found at 347 F.Supp. 169 (S.D.N.Y.1972) (Local 40 of the structural iron workers), and 360 F.Supp. 979 (S.D.N.Y.1973) (Local 638 of the steamfitters). *modified* 501 F.2d 622 (2d Cir. 1974); on remand, unreported decision of Judge Bonsal dated May 5, 1975.

trial, the City of New York (the City) was granted leave to intervene in that portion of the action relating to Local Union No. 28 of the Sheet Metal Workers' International Association (Local 28). *United States v. Local 638, Enterprise Ass'n, etc.*, 237 F.Supp. 164 (S.D.N.Y.1972).³

The defendants who were on trial before this court from January 13 to February 3, 1975 are Local 28, Local 28's Joint Apprenticeship Committee and Trust (JAC), and, for purposes of relief only, the New York City Chapter of the Sheet Metal and Air Conditioning Contractors' National Association (Contractors' Association). By virtue of third and fourth party complaints filed by Local 28 and JAC, the New York State Division of Human Rights (the Division) is a defendant in this action for purposes of relief. The third and fourth-party pleadings were predicated upon administrative and judicial proceedings instituted by the State Attorney General against Local 28 and JAC in which the defendants were directed to end racially discriminatory selection and admission practices under the supervision and direction of the Division.⁴ See *State Commission on Human Rights v. Farrell*, 43 Misc.2d 958, 252 N.Y.S.2d 649 (Sup.Ct.N.Y.Cnty. 1964). Although a nominal defendant in this case, the Division has in its papers and at trial consistently aligned itself with the plaintiffs' cause.

[1] The complaint filed by the United States (the government) alleges that Local 28 is engaged in a pattern and practice of resistance to the full enjoyment by non-whites of rights secured

³ Intervention was sought during the pendency of an administrative proceeding for racial discrimination initiated by the City Commission on Human Rights against Local 28 for violation of Title B, Chapter I, of the New York City Administrative Code (City Human Rights Law). See 347 F. Supp. at 166.

⁴ The Commission on Human Rights had found, after conducting administrative hearings, that the defendants discriminated against Negroes in the designation and approval of applicants for the Local 28 apprentice program. The Honorable Jacob Markowitz of the New York Supreme Court adopted all of the Commission's findings as to JAC and ordered implemented new standards for the admission of apprentices.

to them by Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2(c) and 2000e-2(d). The pattern and practice alleged includes, but is not limited to, the following:

- (a) Failing and refusing to admit nonwhite workmen . . . as journeymen members on the same basis as whites are admitted;
- (b) Failing and refusing to refer non-white workmen for employment . . . (within its jurisdiction) . . . on the same basis as whites are referred by applying standards for referral which have the purpose and effect of ensuring referral priority to . . . (its) . . . members . . . ;
- (c) Failing and refusing to recruit blacks for membership in and employment through . . . (Local 28) . . . on the same basis as whites are recruited;
- (d) Failing and refusing to permit contractors with whom . . . (Local 28) . . . has collective bargaining agreements to fulfill the affirmative action obligations imposed upon those contractors by Executive Order 11246 by refusing to refer out blacks whom such contractors wish to employ;
- (e) Failing and refusing to take reasonable steps to make known to non-white workmen the opportunities for employment in the . . . (sheet-metal trade) . . . , or otherwise to take affirmative action to overcome the effects of past racially discriminatory policies and practices.

The government's complaint does not allege specific acts of discrimination by defendant JAC. To the extent, however, that plaintiffs have succeeded in establishing such violations at trial, the government's complaint is deemed amended to conform to the proof. See Rule 15(b), Fed.R.Civ.P.

The City's complaint (§ 10) alleges that Local 28 is engaged in a pattern and practice of resistance to the full enjoyment by non-whites of rights which are secured to them by § B1-7.0 of

the New York City Administrative Code as well as by Title VII of the 1964 Civil Rights Act. It sets forth the same allegations as to Local 28 quoted above, and adds as an additional example of discriminatory practice:

- (f) Adopting standards for admission to union membership which are not job related and which operate to disqualify a disproportionate number of non-whites for membership.

The City's complaint, furthermore, alleges that defendant JAC is also engaged in a pattern and practice of discrimination, which includes, but is not limited to:

- (a) Failing and refusing to make information concerning apprenticeship opportunities available to non-whites on the same basis as it is made available to whites;
- (b) Failing and refusing to make apprenticeship opportunities available to non-whites on the same basis as they are made available to whites;
- (c) Adopting standards for the selection of apprentices which are not job related and which operate to disqualify a disproportionate number of non-white applicants for apprenticeship.

The allegations of both complaints have been largely substantiated by the evidence produced at trial.

BACKGROUND FACTS

A. Local 28

1. Local 28 is an unincorporated labor union. It is the recognized bargaining agent for journeymen and apprentice sheet metal workers^{*} hired by sheet metal contractors within its geographical jurisdiction.

^{*} Sheet metal workers fabricate and install ducts for ventilating, air-conditioning and heating systems.

2. The geographical jurisdiction of Local 28 includes the five boroughs of the City of New York.

3. A non-white has never been an officer of Local 28, or a member of the Executive Board of Local 28.

4. Since its inception in 1913 Local 28 has been governed by its own Constitution and By-Laws, and by the Constitution and Ritual of the Sheet Metal Workers' International Association. Prior to November 1946, the Constitution of the International Association contained a provision for the establishment of an "auxiliary" local union when there was a "sufficient number of eligible Negro applicants." As stated in this provision, the auxiliary was:

subordinate to the established and affiliated white local union and shall be represented by said white local union at all conferences and conventions, including International Conventions The same initiation, reinitiation and reinstatement fees shall apply to auxiliary members and the privilege of transfer shall be limited to transferring from one auxiliary to another auxiliary.

5. As of October 1, 1974 Local 28 has collective bargaining agreements with approximately 133 sheet metal contractors in New York City. Those contractors do not employ an individual to perform sheet metal work within the trade jurisdiction of Local 28* unless the individual is a member or apprentice of

"In heating and air-conditioning duct work, sheet metal workers plan the job to determine the size and type of metal needed before cutting it with hand snips, power-driven shears, and other tools. They shape the metal with machines, hammers, and anvils, then weld, bolt, rivet, solder, or cement the seams and joints To install ducts, components are fitted together, hangers and braces installed for support, and joints connected and soldered or welded. Some sheet metal workers specialize in shopwork or on-site installation, others do both." Occupational Outlook Handbook, 1974-75 Edition, published by the United States Department of Labor, at 279. This description appears accurate in light of testimony at trial as to the nature of work performed by members of Local 28.

* "The manufacture, fabrication, assembly, erection, installation, dismantling, reconditioning, adjustment, alteration, repairing and servicing of all sheet

Local 28, or has been given an "identification slip" (ID Slip) by Local 28 permitting him to temporarily work in the sheet

metal work (including ferrous or non-ferrous sheet metal) of No. 10 U.S. gauge or its equivalent or lighter gauge, or any and all substitute materials used in lieu thereof (any question of jurisdiction of substitute materials used in lieu thereof in accordance with the Joint Arbitration Plan between the Building Trades Employers' Associations and the Unions of the Building Trades of the City of New York), including all shop and field sketches used in fabrication and erection (including those taken from original architectural and engineering drawings or sketches and all other work included in the jurisdictional claims of Sheet Metal Workers International Association.

"Testing and balancing of all air-handling equipment and duct work contracted for after June 30, 1969. All internal linings for casing, plenum and ducts must be lined prior to erection. Supply casings, Supply air-shafts must be Sheet Metal.

"The manufacturing and erection of all sheet metal work in connection with buildings and structures as follows: hollow metal sash, frames, partitions, skylights, cornices, crestings, awnings, circular mouldings, spandrels (except stamping of same), sheet iron sheeting or roofing, package chutes, linen chutes, rubbish chutes, hoods, sheet metal fire proofing, ventilators, heating and ventilating pipes, air washers, conveyors, breeching and smoke pipes for hot water heaters, furnaces and boilers, laundry dryers and all connections to and from same, metal connections to machines in planning mills, saw mills and other factories (whether it be used for ventilating, heating or other purposes), sheet metal connections to and from fans, separators, sheet metal cyclones for shavings or other refuse in connection with various factories, sheet metal work in connection with or fastened to store fronts or windows, sheet metal work in connection with concrete construction and sheet metal columns and casings, covering all drain boards, lining of coil boxes, ice boxes and other sheet metal work in connection with bar furniture and soda fountains.

"Spot welding, electric arc welding, oxyacetylene cutting and welding in connection with sheet metal work of No. 10 gauge or lighter covered by the collective bargaining agreement also: sheet metal work in connection with plain and corrugated fire doors of No. 10 gauge or lighter: also the erection of floor domes, the setting of registers and register faces in connection with sheet metal work, the cutting and bending of metal necessary for application and erection of metal ceilings and side walls (except stamping), the applying of metal to ceiling and side walls and the furring and sheathing of same. The assembling and erection of fans and blowers: also the erection of metal furniture, factor bins, shelving and lockers, corrugated iron on roofs and sidings,

metal industry within the geographic jurisdiction of Local 28. The reason for this is that members of Local 28 will not work with sheet metal workers who do not fit within either of the two categories above. Thus, despite a contract provision which grants Local 28 contractors autonomy in hiring, Local 28 has substantial, if not complete, control of job opportunities which arise with them.

all metal shingles and metal slate, and tile, plain or covered with a foreign substance, the manufacture and erection of corrugated wire glass and accessories: the glazing of metal skylights. The installation of unit vents where there is sheet metal work in connection with the supply and discharge of air: the setting of radiator enclosures of sheet metal where it does not support the radiator.

"In the manufacturing of drawn metal work: the work of journeyman sheet metal workers shall be the cutting and forming of the metal before the same is applied to the wood, and all clipping and soldering that may be necessary in the finishing of the assembled parts and the covering of wood and composition door frames and sash with sheet metal. Also such other sheet metal work of No. 10 gauge or lighter, not herein specified that has been decided by the Executive Committee of the Building Trade Employers' Association to be, or is now, in the possession of the Sheet Metal Workers' Union shall be regarded as sheet metal worker's work.

"In the Kitchen Equipment Industry it shall be understood that the term "Sheet Metal Work" shall mean all work made of sheet metal No. 10 gauge or lighter including the making, mounting, erecting, cleaning and repairing of all steel and gas ranges, grid irons and oven racks, hoods, tables and stands, warming closets, plate warmers and plate shelves, bands, doors and slides for same, drip pans, urns, and percolators, kettles, revolving covers, meat dishes and covers, steam and carving tables and drainers for same, bain marie boxes and potato mashers and any other items or types of work that may be included in Article I, Section 5 of the Constitution and Ritual of the International Association.

"In the temporary operation of fans or blowers in a new building, or in addition to an existing building, for heating and/or ventilation, and/or air conditioning, the temporary operation and/or maintenance of such fans or blowers."

Description of Local 28's work jurisdiction. Stipulation of Facts, ¶ A(5).

6. In preventing its contractors from hiring non-union non-white sheet metal workers Local 28 has precluded them from fulfilling the affirmative action obligations imposed on them by Presidential Executive Order 11246, 3 C.F.R. Chapter IV § 202, and Mayoral Executive Order 71, April 2, 1968, 96 The City Record 2842 (April 10, 1968). Those orders require recipients of federal construction funds and city construction contracts to take affirmative action to ensure that all applicants for employment enjoy equal access to work opportunities without regard to race, color or national origin.

7. Since 1960 there have been four methods by which individuals have been admitted to membership in Local 28:

- a) successful completion of a four-year apprentice program administered by JAC;
- b) successful performance on a written and practical examination administered by the Examining Board of Local 28 (journeyman's test);
- c) transfer from a sister local union, affiliated with the Sheet Metal Workers' International Association;
- d) employment with a newly organized sheet metal contractor who will certify as to its need for the applicant and the applicant's ability to work in accordance with journeyman standards of performance.

The availability of the first method is determined by the collective bargaining agreement between Local 28 and the employers. The availability of the other three methods is determined by the Executive Board of Local 28, with the approval of the Union membership.

8. As of July 1, 1974, 3.19% of the union's total membership (including pensioners) was non-white.

9. Between January 1965 and July 1974 Local 28 admitted 1103 new members, 79.78% from the apprentice program, 9.07% through the use of written and practical examinations,

5.98% via transfer from sister unions, and 2.81% from newly organized sheet metal shops. Of the 1103 new members, 111 or 10.06% were non-white.

10. Local 28 does not maintain a hiring hall. Referral and hiring are done informally, through word of mouth and contacts with other members, apprentices and contractors. Sometimes business agents call Local 28 members and advise them of job opportunities; sometimes members call the agents seeking information on work openings. In good times, each business agent makes a job referral approximately five to ten times a week.

11. Local 28 refused to participate in the New York Plan when it was in effect in New York City. The Plan was a joint industry, City and State effort to increase participation of minority employees in the construction trades.⁷

B. The Contractors' Association

12. The Contractors' Association is an association of building contractors in New York City who are engaged in sheet metal construction work. It has a collective bargaining agreement with Local 28, and its members employ approximately 70-80% of the union's members and apprentices.

13. The manpower requirements of the Contractors' Association is a mandatory subject of collective bargaining by and between the Association and Local 28.

C. JAC and the Apprentice Program

14. JAC is a joint labor-management committee composed of representatives of Local 28 and of the Contractors' Association. It administers the Local 28 apprentice program.

15. A non-white individual has never been a member of JAC.

⁷ It also refused to work with the City and Federal government in negotiating an alternative tailor-made affirmative action plan.

16. Since 1964 the operation and organization of the apprentice program has been governed by the Standard Form Union Agreement (the Collective Bargaining Agreement), the order and opinion in *State Commission on Human Rights v. Farrell, supra*, which includes the Corrected Fifth Draft of Standards for the Admission of Apprentices for the Sheetmetal Industry of New York City, New York (Corrected Fifth Draft), JAC's Agreement and Declaration of Trust, and JAC's Rules and Regulations.

17. In 1965 non-white enrollment in the apprentice program was .37%. It increased to a high of 21.80% in July 1967, fell to 9.77% in July 1973 and returned to 13.99% in July 1974.

18. The Local 28 apprentice program presently consists of eight terms of six months each. Apprentices attend ten all-day class sessions per term, receiving eight hours of pay for each such session.⁸ The other days they work for employers who have collective bargaining agreements with Local 28.

⁸ The current Collective Bargaining Agreement provides in Rule XVII that if 300 Local 28 journeymen are unemployed, the industry shifts to a six hour day. When the six hour day is in effect, apprentices receive seven hours of pay for each class session. They are paid according to the following scale:

- 1st term - 40% of the journeyman wage rate
- 2nd term - 45% of the journeyman wage rate
- 3rd term - 50% of the journeyman wage rate
- 4th term - 55% of the journeyman wage rate
- 5th term - 60% of the journeyman wage rate
- 6th term - 65% of the journeyman wage rate
- 7th term - 70% of the journeyman wage rate
- 8th term - 80% of the journeyman wage rate

19. Under the most recent (1972) Collective Bargaining Agreement apprentice classes are to be appointed every six months, and the size of the entire program is to be stabilized at 568 apprentices. Between January 1, 1972 and July 1, 1974 the total number of apprentices enrolled in the program has decreased:

January 1, 1972	- 568
July 1, 1972	- 482
November 11, 1972	- 517
January 1, 1973	- 498
July 1, 1973	- 399
January 1, 1974	- 323
July 1, 1974	- 286

20. An apprentice must pass a physical exam and be between the ages 18 and 25 at the time of admission, although exceptions up to age 30 are made for time spent in military service.

21. Since 1969, as a result of the Corrected Fifth Draft contained in the New York Supreme Court decision in *State Commission on Human Rights v. Farrell, supra*, apprentices are required to have high school diplomas or equivalency certificates at the time of admission. For the years 1967-1968 only three years of high school education were required. For the years 1965-1966, only two years of high school education were required. Prior to 1965 apprentices were appointed from an applicants list, with high school diplomas, veteran's status and recommendations of relatives by members of Local 28 receiving some weight in the appointment process.

22. Application forms utilized for the apprentice program require the applicant to list his police record, if any, and his citizenship.

23. Applicants satisfying the age, education and physical requirements are admitted to the apprentice program in accordance with the ranking obtained on an apprentice entrance exam. There is no cut-off pass/fail score for the entrance exam, which is an aptitude exam consisting of tests in five areas (the JAC battery):

- a) mental alertness
- b) mechanical reasoning
- c) space relations
- d) mathematical computations and concepts
- e) mathematical analysis and problem solving

24. Since 1966 the choice of tests in the aforementioned areas, their administration, and the ranking of those tested has been performed by Stevens Institute of Technology (Stevens Institute). In 1965 and 1966 this work was done by the New York Testing and Advisement Center.

25. None of the defendants have kept records of the race or the ethnic identification of persons who have applied or sought to apply to the apprentice program, of persons whose applications have been rejected prior to the aptitude examination, or of persons who have taken the aptitude examination and have been rejected or have themselves rejected admission to the apprentice program.

26. None of the defendants prior to 1973 kept records of the race or ethnic identification of persons taking the apprentice aptitude examination.

27. No one fails out of the apprentice program because of school performance, although he may be left back.

28. JAC assigns apprentices for employment. However, no apprentice can begin working for a Local 28 employer without first receiving a union "apprentice work card."

29. The current Collective Bargaining Agreement between Local 28 and the Contractors' Association provides:

ARTICLE IX

§ 3(c). There shall be a moratorium on apprentices during the period of the six (6) hour day. Apprentices

shall be appointed, but work assignments deferred until return to the seven (7) hour day and shall then be made by the Joint Apprenticeship Committee in accordance with the required needs of the program.

Since October 31, 1973, the industry has been on a six hour day.

DISCRIMINATION IN THE APPRENTICE PROGRAM

Prior to the institution of a new selection procedure in accordance with the Corrected Fifth Draft, Local 28 alone controlled admission to the apprentice program. Union officers testified that the basic selection criterion applied by Local 28 was the applicant's relationship to, or friendship with, union members. Thus the union's selection procedure was largely nepotistic, with the result that a majority of the individuals enrolled in the apprentice program were related in some manner to members of Local 28.⁹ This is further borne out by evidence that no Black was ever enrolled in the apprentice program, and at least during the period from January 1, 1960 through March 15, 1965, only one other non-white individual was a Local 28 apprentice.

[2] Congress's objective in enacting Title VII of the 1964 Civil Rights Act was to achieve equality of employment opportunity by removing those selection barriers which have historically operated to favor white employees; therefore under the Act,

practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

⁹ Local 28's reputation for nepotism also prevented many non-whites who might have otherwise applied from even contacting JAC. One Black mechanic who had sought sheet metal work in New York City in the early 1960's testified that although aware of Local 28, he had not applied because he had "heard that it was a father and son thing, you had to be a relative to become a member . . . That threw me out, I didn't have any relatives." (Tr. 1592).

Griggs v. Duke Power Co., 401 U.S. 424, 429-30, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1970).

Whether the new selection procedure provided for in the Corrected Fifth Draft discriminates against non-whites and/or operates to "freeze the status quo" of the defendants' prior discrimination would best be determined by a thorough statistical analysis of the entire procedure as a whole. However, the fact that no records were kept of applicants' race and national origin has precluded this approach.¹⁰ Plaintiffs at trial therefore sought to establish that each individual component of the selection procedure operates separately to discriminate against non-whites. For the reasons discussed below the court finds that the selection procedure does not fully comport with the mandate of Title VII.

A. The Apprentice Entrance Exam

Plaintiffs' argument as to the JAC battery of tests was based almost exclusively upon the testimony and statistical analysis of Dr. Raymond Katzell, Professor of Psychology at New York University, and an expert in industrial psychology and psychological testing. Dr. Katzell analyzed the percentage of identified non-whites tested, as opposed to that of whites tested, who appeared in the top 50, top 100, and top half of the aggregate rankings for all eight exams administered between April

¹⁰ Neither Local 28 nor JAC maintained such records despite the Equal Employment Opportunity Commission Guidelines on Testing and Selecting Employees (EEOC Guidelines), which require:

Every employer, labor organization, and joint labor-management committee subject to Title VII which controls an apprenticeship program (regardless of any joint or individual obligation to file a report) shall, beginning August 1, 1967, maintain a list in chronological order containing the names and addresses of all persons who have applied to participate in the apprenticeship program, including the dates on which such applications were received. (See section 709(c), Title VII, Civil Rights Act of 1964). Such list shall contain a notation of the sex of the applicant and of the applicant's identification as "Negro," "Spanish Surnamed American,"

1968 and March 1973.¹¹ He found that the percentage of non-whites at each level was smaller than that of whites to a statistically significant degree. This means, in the language of the industrial psychology profession, that the apprentice entrance examination as administered in those eight testing sessions had an "adverse impact" on non-whites, and that the impact was not likely to have happened by mere chance (i. e.: was likely to have occurred by chance on the basis of a random sampling no more than one time in twenty).

Dr. Katzell also separately analyzed each of the eight test batteries in the same manner. He found that on at least one level in each of seven batteries there was a statistically significant difference in percentage. There was no statistically significant difference on the eighth battery. The more conclusive result achieved in the aggregate analysis stems from the larger size of the applicant sample involved.

Dr. Katzell further testified that the presence of statistically significant adverse impact on the JAC battery is not surprising, as Blacks and other economically disadvantaged subgroups perform competitively less well than whites on verbally-based tests. This conclusion is generally shared by the psychology profession. See Cooper and Sobol, Seniority and Testing Under Fair

"Oriental," "American Indian," or "Other."

29 C.F.R. § 1602.20(b) (1975). However, despite the lack of records, plaintiffs managed to research at least in part the race and nationality of applicants for apprenticeship. Out of 3,490 applicants between 1969 and 1972 they were able to identify 489 as non-whites. Of 446 persons who became apprentices, 43 were non-white. Thus, to the extent that plaintiffs' attempts at identification were successful, it appears that 13.43% of whites who applied became apprentices while only 8.79% of non-whites did so, resulting in a success rate for whites of 1½ times that for non-whites. In *Chance v. Board of Examiners*, 458 F.2d 1167, 1171 (2d Cir. 1972) the court found that disparity enough to establish a prima facie case of discrimination.

¹¹ He confined his analysis to the top half and above because with the exception of applicants tested in April 1969 (see p. 479 *infra*) those ranking below have never been selected by JAC for admission to the apprentice program.

Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598 at 1639 (1969); indeed, JAC's expert witness, Dr. Judah Gottesman, senior consulting industrial psychologist at the Stevens Institute of Technology, testified in substantial agreement. See also *Boston Chapter NAACP inc. v. Beecher*, 504 F.2d 1017, 1021 (5th Cir. 1974); *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1337 (2d Cir. 1973).

[3-5] Title VII proscribes standardized testing devices which, however neutral on their face, operate to exclude non-whites capable of performing effectively in the desired positions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). As the Second Circuit noted in *United States v. Wood, Wire & Metal Lathers International Union*, 471 F.2d 408, 414, n.11 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973), "statistics may establish a prima facie case of discrimination" in violation of Title VII.¹² The court finds that plaintiffs' statistical analysis described above establishes such a case, and thereby shifts to defendants the burden of justifying their use of the discriminatory testing device. See *Chance v. Board of Examiners*, 458 F.2d 1167, 1175 (2d Cir. 1972). Since the touchstone in justifying a discriminatory practice is business

¹² Indeed, plaintiffs argue that the statistical disparity between the percent of union and apprentice members who are non-white (3.97%), and the percent of what they define as the "relevant labor force in New York City" that is non-white (36%), is by itself enough to establish a prima facie case of across-the-board discrimination. Defendants, of course, contest plaintiffs' definition of relevant labor force and thereby dispute plaintiffs' statistics. However, even accounting for errors and overinclusion on the part of plaintiff (see discussion *infra* at 488-490), the disparity between the number of non-whites available to Local 28 and JAC as a membership pool and those chosen may well be enough to establish a general prima facie case of discrimination. Cf. *Vulcan Society v. Civil Service Comm'n*, 360 F.Supp. 1265, 1269 (S.D.N.Y. 1973); *aff'd* 490 F.2d 387 (2d Cir. 1973). Rather than rely on this possibility, however, the court has made findings as to each allegation of discriminatory practice. See *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.) cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

necessity,¹³ defendants' burden is to prove by professionally acceptable methods that the Local 28 apprentice entrance exam is significantly related to job performance. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280, 43 U.S.L.W. 4880 (1975); *Griggs v. Duke Power Co.*, 401 U.S. at 431, 91 S.Ct. 849.

To sustain that burden JAC called Dr. Gottesman who testified as to three validation studies which he had performed on the JAC battery. A validation study is one made to determine if a test can with significant accuracy predict an individual's performance on the job. According to Dr. Gottesman, validity studies are of three kinds: A "construct validity" study establishes whether or not the exam determines the degree to which applicants possess characteristics important to job performance. A "content validity" study establishes whether or not the exam contents closely duplicate the actual duties to be performed on the job. Lastly, a "predictive validity" study establishes whether or not exam scores correlate with external variables considered to provide a direct measure of job performance. See American Psychological Association, *Standards for Educational and Psychological Tests* at 25-31 (1974). Of the three methods, the predictive validity study is considered best. *Bridgeport Guardians*, 482 F.2d at 1337; *United States v. Local 638, Enterprise Ass'n*, 360 F.Supp. 979, 992 (S.D.N.Y. 1973), modified 501 F.2d 622 (2d Cir. 1974).

¹³ In *United States v. Bethlehem Steel Corp.*, 446 F.2d 632, 662 (2d Cir. 1971) the Second Circuit adopted the following definition of the business necessity doctrine:

When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, non-racial business purpose.

The court then went on to state: "Necessity connotes an irresistible demand ... if the legitimate ends ... can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued."

The first study performed by Dr. Gottesman fits within none of the three categories described above. At best it may be described as an "indirect validity study." It consists of no more than a comparison of the JAC battery to prevalidated aptitude tests of the same name and supposed subject matter in the United States Employment Service's General Aptitude Test Battery. Such a comparison shows nothing with respect to the JAC battery as a whole. Furthermore, it is predicated on the precarious assumption that aptitude tests with the same name are equivalent.¹⁴ Dr. Gottesman's conclusion that the two sets of tests are "essentially identical" and therefore equally valid accordingly carries little, if any, probative force.

Dr. Gottesman's second study examined predictive validity. Although it also shows nothing with respect to the JAC battery as a whole, it indicates the separate predicative validity of each of the five tests. This study was made possible by the fact that JAC admitted to the apprentice program all of the applicants who took the April 1969 entrance examination (the April 1969 group) regardless of rank. As part of the validation study, when those in the April 1969 group were completing their four year apprenticeships they were examined as to job performance on a practical test ("hands-on") and a written test ("trade-information"). All parties agree that of the two tests, the hands-on sample, created by the apprentice program's coordinator of training, Robert Schluter, is the more direct measure of job performance. Plaintiffs, however, question the adequacy of that test as a scientific criterion of sheet metal success. See note 16 *infra*.

¹⁴ Standard F 4 of the American Psychological Association's *Standards for Educational and Psychological Tests* warns against making such an assumption without evidence to back it up, and rates the advice given as "essential." The EEOC Guidelines specifically rule out "assumptions of validity based on test names or descriptive labels." 29 C.F.R. § 1607.8 (1975). While the EEOC Guidelines are not binding on the courts, the Second Circuit has endorsed reliance on them "as a helpful summary of professional testing standards." *Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, 394 (2d Cir. 1973).

In comparing the apprentices' performance on the hands-on sample to their performance on each component of the JAC battery, Dr. Gottesman was able to determine the correlation between job performance and each aptitude test. He concluded that:

unfortunately, by reason of acceleration, natural attrition and other factors, the graduating apprentice class in June, 1973, did not contain a sufficient number of either Blacks (N=8) or Spanish-surnamed Americans (N=5) to represent statistically meaningful subgroups. *Hence, no case can be made either for or against the existence of any differential validity.* That is, the data does not support or negate any contention that the test predictors operate differently for minorities than for whites.

Ex. W. at 1-2 (emphasis added). His findings, however, show little evidence of validity for *either* whites *or* minorities, and largely support the expert opinion of Dr. Katzell that the apprentice entrance exam adversely affects non-white applicants. Dr. Gottesman's findings, in brief, are that for the April 1969 group as a whole, only one of the five tests in the JAC battery, the mechanical comprehension test, was highly and significantly correlated to the "hands-on" sample. That test, moreover, was the only one in which non-whites scored as well as or better than whites. The math computations and concepts test correlated to a lesser degree, but the other three tests had no significant correlation at all. More importantly, for the non-white applicant group viewed alone, none of the five tests were significantly correlated to the hands-on sample.

Because this study produced only meagre evidence of validity, Dr. Gottesman recommended that JAC alter the apprentice entrance exam. He suggested the elimination of four out of five of the battery tests, leaving only the test on mechanical comprehension, and the addition of a basic arithmetic and a "read and follow directions" test. No action has been taken by JAC on his recommendations.

Dr. Gottesman's third validity study attempted to determine the predictive validity of the JAC battery as a whole. He compared the total weighted raw scores of applicants tested in April

1969 with their May, 1973 combined trade-information, and hands-on scores in order to determine whether a significant predictive correlation existed between the JAC battery and the criteria used to determine performance level. The correlation coefficient he found was one of .25, which Dr. Katzell later demonstrated to be marginal, i.e.: "a weak depiction of relationship between the test on the one hand [and] what you are trying to predict by means of the test on the other." (Tr. 585).

The court has been unable to follow Dr. Gottesman's calculations in arriving at the .25 figure because the data on which it is based have not been made part of the record.¹⁵ From the data available to the court, however, it appears that this study, like the previous predictive one, is seriously incomplete in that it fails to take into consideration forty-two apprentices in the April 1969 group. Those apprentices were not tested as to job performance because they graduated early from the apprentice program. The significance of this omission to the two validity studies premised on relative exam performance becomes apparent when one considers that approximately half of those who graduated early ranked in the *bottom* half of entrance exam scores. Thus they are evidence that persons who score poorly on the test battery can perform successfully as apprentices and journeymen. All of these apprentices readily could have been made available by the defendants for testing; as they had all been inducted, upon graduation, into membership in Local 28.¹⁶

¹⁵ As plaintiffs note in their Post-Trial Memorandum:

Appendix A of Exhibit W contains raw scores of ... apprentices identified only by number. Plaintiffs were unable to do the same calculations as are contained in Dr. Gottesman's testimony because they had no way of correlating the raw scores of people identified only by numbers with the *percentile scores of named individuals (with different identification numbers) which had previously been produced* (P. Exh. 58, Appendices 208).

¹⁶ These last two validity studies are also suspect in that they rely upon a hands-on test as a measure of job performance, yet that test itself was prepared, contrary to the EEOC Guidelines, without benefit of a professional job analysis.

[6] In summary, then, the testimony produced by defendants as to the job-relatedness of the apprentice entrance exam is spotty and largely equivocal. Their validation studies have failed to demonstrate that the JAC battery as a whole is significantly job-related, or indeed, that any of its component parts other than the section on mechanical comprehension is capable of identifying and testing for characteristics necessary to adequate sheet metal performance. Defendants, therefore, have failed to sustain their burden of proving "that the disproportionate impact was simply the result of a proper test demonstrating less ability of blacks and Hispanics to perform the job satisfactorily." *Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, 392 (2d Cir.1973). Further use of the JAC battery will therefore be enjoined.

B. The Requirement of a High School or Equivalency Diploma

Until institution of the Corrected Fifth Draft, applicants were not excluded from the apprentice program for failure to attain a minimum educational level. Indeed, it is unclear to the court even after three weeks of trial testimony and the filing of post-trial memoranda, why the new requirement of a high school diploma was added other than to upgrade in general the median educational achievement level of Local 28. Neither JAC nor Local 28 produced evidence of a relationship between success as a sheet metal apprentice and *completion* of high school.

[7] Plaintiffs' witness, Mrs. Roxee Joly, a high school superintendent and a former mathematics teacher in the New York City school system, reviewed on the witness stand most of the math examinations used in the apprentice program. She described the areas of skill tested in those exams as: decimals, fractions, trigonometry, basic arithmetic, basic arithmetic as

29 C.F.R. § 1607.5(b)(3) (1975). See *Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, at 394 n. 8. As the district court in *Chance v. Board of Examiners* noted, the evaluation of a test's validity "depends upon the reliability and fairness of the field appraisal of performance on the job." 330 F.Supp. 203, 216 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).

to linear measurements, solid geometry and elementary algebra. She noted that students of average academic achievement in the New York City school system are taught those skills in grades four through nine, and defendants in no way rebutted her testimony. They merely emphasized on cross-examination what is a matter of common knowledge — that some students have difficulty learning those skills and must continue to study them in later grades, and that some students never learn them at all. Apprentice program coordinator Robert Schluter furthermore testified that at least in so far as trigonometry is concerned, apprentices are not expected to enter the program with training in it; they are taught all the trigonometry needed to perform as sheet metal workers during their course of study. Thus, although the evidence indicates that knowledge of certain mathematical concepts is essential to adequate performance as an apprentice on written and practical examinations, defendants failed to demonstrate any nexus between that knowledge and a high school diploma.

[8] It is a fact of which the court takes judicial notice that non-white persons obtain high school diplomas at a lower rate than do whites. Publications of the Bureau of the Census, for example, show that the median schooling possessed by all males, age 25 or older, in the New York City Standard Metropolitan Statistical Area is 12.1 years, while that possessed by Black males of the same age group and residence is 10.9 years, and that of Puerto Rican males of the same age group and residence, 8.3 years. 1970 Census of Population General Social and Economic Characteristics, New York, Tables 83, 91, 97. According to the EEOC Guidelines, a specific educational requirement such as a high school diploma is a "test" which must be validated like any other if it adversely affects persons protected by Title VII of the 1964 Civil Rights Act. 29 C.F.R. §§ 1607.2, 1607.3. While the Guidelines are not binding on the courts, they are entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. at 434, 91 S.Ct. 849.

In view of the fact that high school diplomas have never been required as a condition of attaining journeyman status in the

union and that they have only recently been required for entry to the apprentice program, defendants' failure to produce any evidence tending to validate that requirement becomes all the more significant.

History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the common sense proposition that they are not to become masters of reality.

Griggs v. Duke Power Co., 401 U.S. at 433, 91 S.Ct. at 854. This is not to say that no minimum level of education could or should be required as job-related in the sheet metal industry.¹⁷ Defendants, however, have simply not produced convincing evidence that for Local 28's apprentice program the line should be drawn at twelve years. Cf. *United States v. Sheet Metal Workers, Local No. 10*, 6 E.P.D. ¶ 8715 (D.N.J.1973). Further requirement of a high school or equivalency diploma for entrance to the Local 28 apprentice program will therefore be enjoined.

C. The Application Form - Inquiry as to Arrest Record

Two types of application forms have been used by JAC for the apprentice program since 1965. Both contain a section which reads as follows:

POLICE RECORD: List below, giving all detailed information, any police record that you have. List each arrest.

¹⁷ If the need for mathematical skills to adequately perform as an apprentice, however, is the only concern, it would seem that such skills could be better evaluated through a contemporary test of mathematical ability than by inference of that ability drawn from completion of a given educational level. Cf. *Dobbins v. Local 212, Electrical Workers*, 292 F.Supp. 413, 453 (S.D. Ohio 1968).

It is not necessary to list minor traffic violations. This information must be accurate and complete. Any information which is withheld will be cause for immediate dismissal from the Apprentice Program. If none, say "none."

Name and Address of Police Station or Court	Date	Offense	Outcome
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It is evident that this section is intended to encompass both convictions and arrests. Plaintiffs object, however, only to the inquiry about arrests. Although they introduced evidence of five instances since 1965 in which JAC rejected applicants because of information contained in the Police Record section of their applications, the evidence is more remarkable for its paucity than for its probative weight; it is apparently unknown whether those five applicants were rejected because of conviction records or because of arrest records.

[9] Plaintiffs also introduced into evidence two tables from *Crime in the United States, Uniform Crime Report 1973* issued by Clarence M. Kelly as Director of the FBI, which indicate that non-whites are arrested both nation-wide and city-wide proportionately more often than whites. From this they argue that the presence of the Police Record section on the application form adversely affects non-whites, and therefore imposes a burden on the defendants to validate the arrest inquiry as job-related. The burden, however, cannot be shifted quite so easily; plaintiffs have not established a *prima facie* case that JAC has a policy of rejecting applicants who have suffered arrest without conviction, or even that JAC has rejected such applicants in the past. Cf. *Gregory v. Litton Systems, Inc.*, 316 F.Supp. 401, 402 (C.D.Cal. 1970); *aff'd* in relevant part, 472 F.2d 631 (9th Cir. 1972). On the evidence presented, therefore, this court cannot determine that the apprentice program application form discriminates in practice against non-whites. Accord. *Green v. Missouri Pacific R. R. Co.*, 381 F. Supp. 992, 996 (E.D.Mo.1974).

DISCRIMINATION IN DIRECT ADMISSION TO LOCAL 28

Non-whites presently are, as they have been in the past, conspicuously absent from Local 28. Although qualified non-white sheet metal workers exist in large percentages in other construction locals within the New York metropolitan area, in particular Local Union 400 (Blowpipe Division) of the Sheetmetal Workers International Association, their rate of pay is substantially lower than that received by the Local 28 membership.¹⁸ Defendants would explain this grouping of non-whites in the lower-paying union by arguing that the work performed by Local 28 is more complex and therefore requires a more skilled and adroit membership.

Plaintiffs, however, presented convincing evidence at trial, from members and contractors of both locals, that the skills and tools required to perform Local 400 work are largely the same as those required of Local 28 jobs. Although the trade jurisdiction of the two unions are separate and discreet,¹⁹ they overlap

¹⁸ Louis Commarato, president of Local 400, testified that in 1965-1966, members of his union earned approximately \$2.25 an hour compared with Local 28's \$5 an hour. As of July 1974, Local 400 men earn \$7.10 per hour while members of Local 28 receive \$12.05 per hour. Similarly, members of Local 295 of the Operating Engineers, who also perform sheet metal work, receive \$4.60 per hour.

¹⁹ The trade jurisdiction of Local 400 encompasses:

"Spray booth systems, including blowers, tanks (duct work incidental to the system if 75 ft. or under), if over 75 ft., all duct work incidental to the system will be subcontracted to a sheet metal shop in agreement with Sheet Metal Workers' International Association local having jurisdiction in the area in which the work is being done.

"Ovens and drying systems, including the manufacture of ovens, heaters, panels, etc., (and the duct work incidental to the system if 75 ft. or under), will be subcontracted to a sheet metal shop in agreement with the Sheet Metal Workers' International Association local having jurisdiction in the area in

to a significant degree. It is not unusual, for example, for members of Local 28 to perform blowpipe work.²⁰ Likewise, members of Local 400 are authorized by their collective bargaining agreement to perform up to 75 feet of the square duct work usually considered within Local 28's jurisdiction.

The Local 400 apprentice program, furthermore, is modeled after that of Local 28. Testimony of Thomas Carlough, a member of Local 28 who instituted and now coordinates Local 400's course of apprentice training, indicates that students in both programs are taught the same sheet metal skills. Thus, although a Local 28 member might be more adept at square

which the work is being done. "Dust collecting systems, including the exhausts, blowers, fans, round pipe and cyclones.

"Conveyor systems; except no slide chutes or hoppers to be installed except at Building Trades rates by a sheet metal shop in agreement with a Building Trades local of the Sheet Metal Workers' International Association.

"Smoke houses.

"Plating and degreasing tanks, including the exhaust systems and round pipe work.

"Smoke stacks; breechings only when done as an accommodation while doing an installation covered in this Schedule in an existing plant.

"Retail bakery work where the duct work does not exceed 75 ft. on the exterior of the building - if over 75 ft. all duct work incidental to the system will be sub-contracted out to a sheet metal shop in agreement with the Sheet Metal Workers' International Association local having jurisdiction in the area in which the work is being done.

"Furnish and install makeup air systems in industrial plants."

²⁰ Blowpipe work entails the creation of ducts to be used for removal of fumes, dust or indeed particles of any substance that be conveyed by air. It usually involves fabrication and/or installation of round duct work. Local 28's sheet metal work, on the other hand, usually involves fabrication and installation of rectangular or square ducts. Blowpipe work tends to involve prefabricated or standard elbows, joints and forms whereas rectangular ducts for heating and air conditioning units must more frequently be custom made.

duct work, or faster because of his daily familiarity with it, members of Local 400 are certainly equipped to, and can, perform the same work.²¹ The fact that Local 28 has initiated numerous complaints against Local 400 for infringement of its trade jurisdiction only corroborates this conclusion.

[10] Why, then, is it that non-white sheet metal workers are not evenly distributed throughout the industry? Plaintiffs have argued, and the court finds that Local 28 has denied qualified non-whites direct access to membership in the union while granting such access to white persons by: (a) failing to administer yearly journeyman tests, and using as journeyman tests examinations not validated by EEOC Guidelines; (b) selectively organizing non-union sheet metal shops with few, if any, non-white employees, and/or admitting from those shops only white employees; and (c) accepting as transfer members whites from affiliated sister locals while refusing transfers of non-whites.

A. The Journeyman Tests

It is a matter of common knowledge that at least between 1967 and 1972 the urban areas of the United States experienced a construction boom. Yet since 1959, Local 28 has administered only two journeyman examinations. Both of these exams came about as a result of arbitration proceedings brought by the Contractors' Association to force the union to increase its manpower. In 1968 when ordered by Arbitrator Theodore Kheel to admit 100 new journeymen, Local 28 designed and administered a journeyman test which, admittedly, has never been validated in accordance with EEOC Guidelines. Of 330 individuals tested on the first, written portion of the exam, only thirty-four passed, and were allowed to proceed to the practical portion. Ten failed the practical portion, with the result

²¹ The only skill found within Local 28 which is not shared by Local 400 is that of drafting. Not all members of Local 28 are drafters, however; drafting is considered the highest specialty in the union, and requires extra training over and above that acquired in the apprentice program.

that twenty-four journeymen, all white, were admitted to the union. The above statistics would seem to indicate that the test served more as an obstacle to, than a vehicle for, the admission of new journeymen. Indeed, one of the candidates for admission, then a fourth-year apprentice in Local 400, testified that "the test was pretty far out. In other words, you had to have more or less a college degree to really do anything on that test." (Tr. 1543).

[11] Although Local 28 may have only intended to limit the number of new journeymen (white or non-white) admitted by way of the 1968 exam, the effect of that exam was to exclude non-whites. Robert Schluter, chairman of the local's examining board, testified that by visual observation 15% of those taking the exam were Black; he could not estimate the number of Hispanics. Even assuming that no Hispanics were tested, the exam clearly had an adverse impact on non-whites, and as such, without validation, was violative of Title VII. See *Griggs v. Duke Power Co.*, 401 U.S. at 430, 91 S.Ct. 849.

In 1969, following another arbitration order, Local 28 administered a second journeyman test. According to Chairman Schluter the exam had been restructured since 1968 so as to eliminate questions involving mathematical concepts unrelated to sheet metal work, and replace them with questions of "shop math." As a result, 14 non-whites and 61 whites successfully passed the journeyman test and were admitted to the union. Because of Local 28's failure to keep records as to the numbers of whites and non-whites tested it is not possible to determine whether this exam also had an adverse impact on non-whites. In 1969 as in 1968 the exam had been advertised by sending a letter of notice to the New York State Employment Service, the Veterans Administration, the New York State and New York City Human Rights Offices, the Workers Defense League, members of Local 28, and Local 28 contractors. Application forms were not sent, however, as Local 28 required that these be obtained and filled out in person at union headquarters.

In 1970 Local 28 refused to administer another journeyman test. Instead, in response to pleas by the Contractors Association

for more manpower, Local 28 recalled pensioners who on doctors' certificates were able to work, and issued hundreds of ID slips to members of affiliated locals and allied construction trades. Between July 1, 1969 and July 1, 1972, Local 28 issued the following numbers of ID slips:

7/1/69	150-200
1/1/70	200-250
7/1/70	200-250
1/1/71	250-300
7/1/71	400-450
1/1/72	400-450

Only one of those receiving ID slips has been identified as non-white. In addition, despite the fact that Local 28 saw fit to request ID men from sister locals all across the country, as well as from allied New York construction unions such as plumbers, carpenters and iron-workers, it never once sought them from Sheet Metal Local 400.²² Furthermore, in 1969 when a group of apprentices and journeymen from Local 400 went to Local 28's offices to request ID cards, they were informed by Union President Mell Farrell that the union was not giving out ID slips.

[12] By using the ID slip system of temporary manpower rather than continuing to administer journeyman tests, Local 28 restricted the size of its membership and thereby enabled its membership to earn substantial payment for overtime work. This had the illegal effect, if not the intention, of denying non-whites access to employment opportunities in the industry. Cf. *United States v. Local 638, Enterprise Ass'n*, 347 F.Supp. at 181; accord *United States v. Local No. 357, et al.*, 356 F. Supp. 104, 116 (D.Neb.1973). Union President Farrell in 1971 at a

²² Local 28's asserted reason for not contacting Local 400 was its "knowledge" that members of the 400 Blowpipe Division were enjoying full employment. Yet Thomas Carlough, coordinator of the Local 400 apprentice program and himself a member of Local 28, testified that in 1970 the bankruptcy of a major blowpipe shop left many 400 sheet metal workers without jobs.

Joint Adjustment Board grievance proceeding initiated by the Contractors Association justified the refusal to enlarge union membership by remarking that "overtime is expected in the Construction Industry" (Ex. 111 at 2). Self-serving expectations, however, do not constitute business necessity within the meaning of Title VII. Cf. *United States v. Local 638, Enterprises Ass'n*, 501 U.S. at 633.

B. Organization of Non-Union Shops

Prior to 1973 no non-white ever became a member of Local 28 through the organization of a non-union shop. The explanation for this proffered by the union is that they have never been aware of any non-union sheet metal shops owned by or employing non-whites. Such an assertion, aside from testing the credulity of the court, is clearly contradicted by the testimony of record. For example, Edward Carlough, former president of Local 28, testified by deposition that he had been aware of non-union shops employing non-white sheet metal workers as early as the 1940s. In addition, Rupert Jonas, a Black sheet metal worker in Local 295 of the Operating Engineers, testified that in 1971 Local 28 organized the Integrity Air Conditioning shop in which he worked with ten other non-whites.

Since 1973 non-whites have only gained membership in Local 28 through organization of shops because the parties to this litigation during settlement negotiations entered into an agreement whereby the union was to embark on an organizing campaign. Pursuant to that agreement Local 28 organized six shops in 1973 and 1974, and thereby admitted three non-whites to membership.

A large percentage of the shops with non-white workers which Local 28 had the opportunity but chose not to organize were blowpipe companies. In the late 1950's and early 1960's the Sheet Metal Workers' International Association urged Local 28 to organize the blowpipe industry in the metropolitan region. The industry at that time consisted of approximately 265-365

workers, 60 to 75 % of whom were non-whites. Local 28 refused to organize them despite insistent pressure from the International Association as well as from the Contractor's Association.²³ Its official reason was that the blowpipe contractors could not meet Local 28's pay scale, and the union could not under its collective bargaining agreement accept a wage differential for its members.²⁴ The unofficial reason, however, appears to be that Local 28 did not wish to admit as members the non-white blowpipe workers.

[3] Seymour Zwerling, the principal of several contracting companies in signed agreement with Local 28, testified that it was a matter of "common knowledge in the industry" that the union did not want to organize the blowpipe workers because many of them were minorities. (Tr. 1145). Indeed, there appears to be no other reason for the union's refusal. In organizing an entire industry it would not have been able, as with individual shops, to admit only white workers and exclude non-white employees. In any case, whatever the reason, the effect of Local 28's refusal was the denial to non-whites of employment opportunities granted whites. "Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation." *Griggs v. Duke Power Co.*, 401 U.S. at 432, 91 S.Ct at 854. As a result of the union's refusal the International Association organized blowpipe workers on its own, forming them into a special building trades division of Local 400.

²³ The Contractors' Association wanted the blowpipe workers organized so as to have access to greater manpower, and so as to eliminate competition from the blowpipe contractors. (Tr. 1127).

²⁴ A dual wage scale, however, had for many years already existed within the union. Edward O'Reilly, Recording Secretary of Local 28, admitted that the Kalamein Workers (those union members specializing in applying sheet metal linings to doors) receive a lower rate of pay than other members of the local union. (Tr. 225).

C. Transfers

Section 9(k) of Article 16 of the Sheet Metal Workers' International Association Constitution and Ritual provides:

Any member who has established a record of continuous good standing of five (5) years or more to and including date of issuance of transfer card *shall be admitted* by transfer card into any local union of this Association in accordance with the requirements of this Constitution, and without payment of any difference in initiation fee.

(emphasis added). Such a provision has existed in the Constitution since at least 1946. During the period from 1967 through 1972, Local 28 accepted fifty-seven transfers from sister locals. All of those accepted were white. Indeed, between May 1940 and February 1973, Local 28 accepted 153 transfers, all of whom were white. Only after commencement of this litigation did the union, in 1973, accept its first non-white transfers, two journeymen from Local 400.

The homogeneity of the transfer group, however, is not the only evidence of Local 28's purposeful discrimination against non-whites. Henry Woods, a Black member of Local 28 who gained admission to the union through the 1969 journeyman test, stated at trial that he and several other blowpipe workers from Local 400 inquired about transfer of Local 28 President Farrell. Farrell told them that transfer was impossible since they were not members of a building trades union like 28. (Tr. 1641.) Given his familiarity with the organization of the blowpipe industry, Farrell indubitably knew that his statement was false. Furthermore, only nine months previously, four white blowpipe workers from Local 400 had been allowed to transfer into Local 28.

At trial present union officials testified that they had no records of, and could recall no non-whites ever requesting transfer into Local 28. However, traditionally all requests for transfer are formally made in person before the union's Executive Board. Non-whites who were discouraged when they

inquired informally as to transfer, were simply never given the opportunity to appear before the Board. Even had they been permitted to do so, however, Local 28 policy would have prevented their transfer. Union Recording Secretary Edward O'Reilly testified that for at least the past ten years, Local 28 has refused to accept transfers of all but former members, a policy in direct contravention of the International Association Constitution and Ritual.

[14] This "members only" policy went into effect in the early 1960's when Local 28 was almost exclusively all white. It therefore effectively foreclosed transfer into Local 28 by non-whites. Although the International Association has on an occasional appeal overruled Local 28 and ordered it to accept a qualified transfer worker, this has never resulted in the admission of a non-white journeyman. The existence of an appeal procedure clearly cannot be viewed as justifying or in any way ameliorating the union's practice of denying to qualified non-whites the equal access to employment opportunities guaranteed them by the Civil Rights Act.

CONCLUSIONS

1. Local 28 is a union and labor organization within the meaning of § 701(d). Title VII of the 1964 Civil Rights Act and § B1-2.0, subd. 3, Title B of the New York City Administrative Code, and is engaged in an industry affecting commerce.

2. JAC is a joint labor-management apprenticeship committee within the meaning of § 701(d), Title VII of the 1964 Civil Rights Act and § B1-7.-0(1)(a), Title B of the New York City Administrative Code, and is engaged in an industry affecting commerce.

3. Prior to the effective dates of Title VII and Title B, and continuing to the present, Local 28 has maintained clearly discernable discriminatory practices in recruitment, selection, training and admission to membership of non-white workers. As a result of this history of discrimination Local 28 has had a well-deserved reputation in non-white communities of

discriminating in recruitment, selection training and admission. This reputation operated and still operates to discourage non-whites from seeking membership in the local union or its apprentice program, in violation of Title VII and Title B.

4. Prior to the effective dates of Title VII and Title B, JAC and Local 28 maintained standards and practices in selection of apprentices for admission to the Local 28 apprentice program which discriminated against non-whites. JAC and Local 28 have a clearly deserved reputation in non-white communities of discriminating in the administration of the Local 28 apprentice program. This reputation operated and still operates to discourage non-whites from seeking to enter the apprentice program in violation of Title VII and Title B.

5. Subsequent to the effective dates of Title VII and Title B, JAC and Local 28 adopted selection procedures and standards for admission to the Local 28 apprentice program, some of which are not demonstrably job-related. They operate individually and in combination to prevent non-whites from enjoying equal access to the program in violation of Title VII and Title B.

6. Local 28 and JAC, by virtue of the above-described discriminatory practices, have illegally denied non-whites access to lucrative employment opportunities in the sheet metal industry equal to that enjoyed by whites, and have thereby maintained Local 28 as a white "A" local to the Blowpipe Division's racially mixed "B" local.

7. In order to remedy the effects of the above-described discrimination, Local 28 and JAC have been, and are under an obligation to take affirmative action to recruit, select, train, admit to the apprentice program and admit to membership in the local union substantial numbers of non-whites.

RELIEF

[15] In determining what relief could most appropriately remedy the ongoing effects of defendants' discrimination, it is

a relevant inquiry whether each defendant has "voluntarily 'cleaned house' or taken any meaningful steps to eradicate the effects of its past discrimination." *Rios v. Enterprise Ass'n*, 501 F.2d 622, 631-632 (2d Cir. 1974). The record in both state and federal court against these defendants is replete with instances of their bad faith attempts to prevent or delay affirmative action. After Justice Markowitz ordered implementation of the Corrected Fifth Draft, with the intent and hope that it would create "a truly nondiscriminatory union."²⁵ Local 28 flouted the court's mandate by expending union funds to subsidize special training sessions designed to give union members' friends and relatives a competitive edge in taking the JAC battery. JAC obtained an exemption from state affirmative action regulations directed towards the administration of apprenticeship programs on the ground that its program was operating pursuant to court order; yet Justice Markowitz had specifically provided that all such subsequent regulations, to the extent not inconsistent with his order, were to be incorporated therein and applied to JAC's program. More recently, the defendants unilaterally suspended court-ordered time tables for admission of forty non-whites to the apprentice program pending trial of this action, only completing the admission process under threat of contempt citations.

[16] "Once a violation of Title VII is established the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices." *Rios v. Enterprise Ass'n*, 501 F.2d at 629. In light of Local 28's and JAC's failure to "clean house" this court concludes that the imposition of a remedial racial goal in conjunction with an admission preference in favor of non-whites is essential to place the defendants in a position of compliance with the 1964 Civil Rights Act. The use of such measures to compel compliance with the letter and spirit of civil rights legislation is well-recognized. See *Patterson v. Newspaper and Mail Deliverers' Union*, 514 F.2d 767, 2d Cir. 1975; *Rios v. Enterprise Ass'n*, *supra* and cases cited at 629; *United States v. Wood Wire & Metal Lathers International*, *supra*.

²⁵ *State Commission on Human Rights v. Farrell*, 43 Misc.2d at 969, 252 N.Y.S.2d 649.

The purpose of setting a remedial goal is to place eligible non-whites in the position they would have enjoyed had there been no discrimination. To do so here the court must determine what percentage of union and apprentice program members would today be non-white had the defendants not engaged in discriminatory practices. The best available measure of that percentage is the percentage of non-whites in the relevant labor force existing today within New York City. Although there is some danger inherent in assuming the equivalence of these percentages, the court does so in an effort to "do the best it can" with the information available to it. *Rios v. Enterprise Ass'n*, 501 F.2d at 632.

The relevant labor force in this case consists of an aggregate of three groups: males, eighteen years of age and older²⁶ with zero to eight years of education, males eighteen years of age and older with nine to twelve years of education, and males eighteen years of age and older with more than twelve years of education.²⁷ Since the only available labor force statistics come from the 1970 Census conducted by the Department of Commerce the court, to be as accurate as possible, should look to males who at the time of the census were thirteen years or older (*i. e.*: now eighteen years of age or older). Unfortunately, census figures speak of males sixteen years and older rather than males eighteen years and older. Thus to the extent that thirteen, fourteen and fifteen-year old males are excluded from our calculations, the total labor force figure arrived at is low.

²⁶ The age requirements for admission to the Local 28 apprentice program were not challenged by plaintiffs.

²⁷ The three educational divisions were made in an attempt to replicate the educational mix which census figures show to exist among sheet metal workers nationwide. Those figures show that 23.98% of sheet metal workers nationwide have completed zero to eight years of education, 67.79% have completed nine to twelve years of education, and 8.22% have completed more than twelve years of education. See 1970 Census of Population, Subject Reports, Occupational Characteristics, PC(2)-7A. Table 5.

The census figures, furthermore, while they reflect relevant data on total population, Black population, Spanish language population and Puerto Rican population, fail to isolate a Spanish *surnamed* group. The court therefore has used census statistics on Spanish language persons.²⁸ For these reasons, and others of similar nature, absolute precision in the calculation of a percentage goal is impossible. However, using figures provided by the Bureau of the Census to the best advantage, and adjusting for the fact that a percentage of Spanish language males are Black,²⁹ the court has determined that approximately 29% of the relevant labor force in New York City is non-white. See Appendix for an explanation of the court's method of determining percentage goal.

[17, 18] The court accordingly orders that by July 1, 1981, the combined union and apprentice program membership achieve a non-white percentage of 29%.³⁰ The recruitment, testing and admission procedure for arriving at that goal is to be agreed upon and developed by the parties, under the

²⁸ *Spanish language persons* are defined by the Bureau of the Census as those individuals "of Spanish mother tongue and all other persons in families in which the head or wife reported Spanish as his or her mother tongue." *Mother tongue* is defined as the language spoken in the person's home when he or she was a child, 1970 *Census of Population, General Social and Economic Characteristics*, PC(1)-C34 (hereinafter "General Social and Economic Characteristics") Appendix B. at 7.

²⁹ Approximately 11.6% of males of Spanish origin are Black. *Rios v. Enterprise Ass'n*, 400 F.Supp. 983 S.D.N.Y. 1975. Persons of Spanish origin are those who indicated to the census takers that they were of Mexican, Puerto Rican, Cuban, Central or South American, or "Other Spanish" descent. General Social and Economic Characteristics. Appendix B. at 7. 34. The parties have provided the court with the separate figures as to the percentage of Spanish language males who are Black. The Court has consequently assumed the percentage to be the same as that for males of Spanish origin.

³⁰ The court has chosen a six year period for implementation of the 29% goal after full consideration of the depressed economic condition of the construction industry, and in the firm belief that a gradual but steady influx of non-whites will produce the most stable membership.

guidance of a court-appointed administrator, within the next two months. The court specifically requires, however, that the following be included as part of such procedure:

— The union is to administer a non-discriminatory hands-on journeyman's test, professionally developed and validated in accordance with EEOC Guidelines, at least once a year; the first such test is to be given in or before September 1975.

— JAC is to administer a yearly apprentice entrance exam consisting solely of the mechanical comprehension aptitude test validated by Dr. Gottesman and a "read and follow directions" test to be developed professionally and validated in accordance with EEOC Guidelines; the first such test is to be given in or before December 1975.

— The union is to replace one of its present JAC trustees with a non-white.

— Both Local 28 and JAC, in conjunction with the Administrator, are to develop recruitment practices specifically designed to dispel their reputation for discrimination in non-white communities and to guard against the recurrence of such reputation.³¹

— Both Local 28 and JAC are to maintain separate lists of whites and non-whites who (a) apply to take the apprentice entrance exam and/or the journeyman's test; (b) take the apprentice entrance exam and/or journeyman's test; (c) pass the apprentice entrance exam and/or

³¹ In *Gresham v. Chambers*, 501 F.2d 687, 691 (2d Cir. 1974) the Court of Appeals noted:

Where a pattern of past discrimination appears, recruitment procedures that might otherwise be classified as neutral will no longer be accepted as non-discrimination. Additional methods must then be devised to compensate for the effects of past discriminatory practices and to guard against their perpetuation or recurrence.

journeyman's test; (d) seek to transfer into Local 28 from a sister local; and (e) inquire about the possibility of transferring into Local 28.

The administrator named by the court is also requested to develop with the parties a plan aimed at protecting non-whites admitted into union and apprentice membership from bearing a disproportionate burden of the unemployment caused by current depressed conditions in the construction industry.

In light of the recent Supreme Court decision in *Albemarle Paper Co. v. Moody*, *supra*, this court is constrained to determine whether an award of back pay here pursuant to 42 U.S.C. § 2000e-5(g) is necessary and appropriate. In *Albemarle* the Court held that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of . . . [Title VII]" Those purposes are "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . [whites] . . ." over others, *Griggs v. Duke Power Co.*, 401 U.S. at 429-30, 91 S.Ct. at 853, and to make whole those persons who suffered injury on account of such unlawful discrimination. As the Court noted in *Albemarle Paper Co.*, *supra* 422 U.S. at 417, 95 S.Ct. at 2371, backpay has an obvious connection with these purposes:

It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices"

[19, 20] Plaintiffs in this case did not specifically request backpay in their complaints, and did not during trial attempt to define proposed classes of persons entitled thereto. However, they did include in their proposed post-trial findings the following paragraph:

As a result of the above-described discrimination, non-whites have suffered financial loss and are, therefore entitled to receive backpay in amounts to be determined subsequent to the trial of this action.

The tardiness with which plaintiffs assert their demand for backpay does not preclude the court from awarding it where entitled, Rule 54(c) Fed.R.Civ.P. and in this case, does not prejudice the defendants, who have long been on notice of the discriminatory practices which are alleged as the basis for backpay relief. The difficulty with plaintiffs' proposal, however, is that no complete records exist of persons who would be entitled under it to an award of backpay. Although the court hesitates to limit relief on this ground, thus in effect rewarding defendants for their failure to keep adequate records as required by the EEOC Guidelines, the alternative is clearly unacceptable. Any award of damages to those for whom records do not exist would at best be hypothetical. The court therefore concludes that backpay should be awarded by Local 28²² only to non-white persons

- a) for whom there exist records of application for direct entry into the union, either through the journeyman's exam or through transfer procedures;
- b) who demonstrate before the administrator, in light of this court's conclusions of law on the merits, that they were discriminatorily excluded from union membership;²³ and
- c) who show monetary damages suffered as a result thereof.

This class of persons is undoubtedly small. There is no risk, therefore, that it will inequitably drain the financial resources of the non-profit defendant association.

[21] Damages suffered by persons denied entrance to the apprentice program and by blowpipe workers organized as part of Local 400 rather than as part of Local 28, are too highly

²² As JAC has no role in granting or denying *direct* admission to Local 28 it will not be held liable for backpay.

²³ This of course includes a showing that claimant is qualified for admission in accordance with Local 28's entrance requirements as modified by this decision.

speculative to merit backpay awards in this case. Likewise the award of damages to that class of non-whites who would have applied for direct admission to membership had Local 28's reputation for discrimination been less pervasive will also be denied as unascertainable.

[22, 23] Those non-whites who are entitled to backpay awards must file a claim with the administrator on or before January 15, 1976. They may recover proven damages from the date the discrimination occurred³⁴ to the date of filing of this decision on the merits, or to the date of union admission, whichever is earlier. Damages shall be computed on the basis of the average monthly wage earned in each calendar year by members of Local 28, and shall of course be adjusted to reflect other employment income or public assistance received by claimants. See 42 U.S.C. § 2000e-5(g); Memorandum Decision of Judge Bonsal, *Rios v. Enterprise Ass'n*, 400 F.Supp. 988, S.D.N.Y., June 27, 1975. Payment is to be made after determination by the administrator of all claims, and their discretionary review, if necessary, by this court.

³⁴ Discrimination for purposes of backpay computations will be deemed to have occurred on the date on which the next applicant for admission who does not qualify as a non-white, as defined for purposes of this case, is admitted to the union. See *Rios v. Enterprise Ass'n*, 400 F.Supp. 988 S.D.N.Y. 1975 memorandum decision of Judge Bonsal.

Title VII specifically provides that "back pay liability shall not accrue from a date more than two years prior to the filing of a charge with Commission." 42 U.S.C. § 2000e-5(g). No such time limitation is imposed here, however, because unlike the *Rios* class action case, this action was not initiated by the filing of a charge with the EEOC. Rather, it was begun by the Attorney General in accordance with the procedures outlined in 42 U.S.C. §2000e-6(a).

Ruling that accrual not extend more than two years prior to the filing of the Attorney General's complaint would appear a logical analogy under the circumstances. However, in formulating the accrual limitation quoted above, the United States Senate specifically rejected a provision that would have limited backpay liability to a date two years before institution of judicial proceedings. *Albemarle Paper Co.*, *supra* 422 U.S. at 420, n. 13, 95 S.Ct. 2362. In light of this legislative history, and the small number of persons entitled to backpay in this case, the court chooses not to limit accrual of Local 28's liability.

The foregoing constitute the court's findings of fact and conclusions of law. The parties and the administrator are ordered to submit an agreed upon recruitment, testing and admission procedure within 60 days of the filing of this decision. The court will maintain continuing jurisdiction over the parties to this action for purposes of ensuring implementation of appropriate relief.

So ordered.

APPENDIX

The Court's Method of Calculating Percentage Goal*

1. Total number of Spanish language males 18 and over:

To find this total the court determined the ratio of the number of Spanish language males in the population to the number of Puerto Rican males in the population, and then multiplied the number of Puerto Rican males 18 and over by that ratio.

$$\frac{\text{Number of P.R.}^b \text{ Males 18 and over}}{\text{Number of Spanish language}^c \text{ Males in the Population}} \times \frac{\text{Total Number of Spanish Language Males 18 and Over}}{\text{Number of P.R. Males in the}^d \text{ Population}} =$$

* The formula used in this appendix is substantially the same as that employed by Honorable Dudley B. Bonsal in *Rios v. Enterprise Ass'n*, *supra*, 400 F.Supp. 988. "Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" *Albemarle Paper Co. v. Moody*, 422 U.S. at 417, 95 S.Ct. at 2371.

^b Taken from Table 131, *General Social and Economic Characteristics* at 863.

^c Census data speaks only of Spanish language population. See Table 119, *General Social and Economic Characteristics* at 607. The court assumes, however, that the percentage of males among that population is equivalent to the percentage of males among the Puerto Rican population, i.e.: 47.5%. See Table 129, *General Social and Economic Characteristics* at 659.

^d Taken from Table 129, *supra*.

2. Adjusted number of Spanish language males 18 and over:

The court then multiplied this figure by (1 minus .116)* or .884 in order to avoid counting Blacks as Spanish language males.

$$\left[\frac{\text{Number of P.R. Males 18 and over}}{\text{Number of Spanish language Males in the Population}} \times \frac{\text{Adjusted Number of Spanish Language Males 18 and over}}{\text{Number of P.R. Males in the Population}} \right] \times .884 =$$

3. Total number of non-white males 18 and over:

Lastly, the court added the number of Black males 18 and over to arrive at the total for non-white males 18 and over. (T)

$$\left[\frac{\text{Number of Black Males 18 and over} + \frac{\text{Number of P.R. Males 18 and over}}{\frac{\text{Number of Spanish Language Males in the Population} \times .884}{\text{Number of P.R. Males in the Population}}} \right] = T$$

* See note 29 *supra*.

4. Total number of non-white males 18 and over in each educational category:

For reasons explained in the opinion, *supra* at note 27, the court sought to identify:

- (a) the total number of non-whites 18 and over who have completed zero to eight years of education,
- (b) the total number of non-whites 18 and over who have completed nine to twelve years of education; and
- (c) the total number of non-whites 18 and over who have completed more than twelve years of education.

The court therefore conducted three series of calculations using the formula for T as adjusted to reflect education (T(a), T(b) and T(c)).

$$\left[\begin{array}{l} \text{Number of Black}^1 \\ \text{Males 18 and over +} \\ \text{over with ()} \\ \text{education} \end{array} \right] + \left[\begin{array}{l} \text{Number of P.R.}^* \\ \text{Males 18 and} \\ \text{over with ()} \\ \text{education} \end{array} \right] \times \left[\begin{array}{l} \text{Number of Spanish} \\ \text{Language Males in } \times .884 \\ \text{the Population} \end{array} \right] \div \left[\begin{array}{l} \text{Number of P.R.} \\ \text{Males in the} \\ \text{Population} \end{array} \right] = T()$$

¹Census figures reflect educational levels for males 25 and over. See Table 125, *General Social and Economic Characteristics* at 643. The court assumes that educational levels of males 18 and over would be equivalent.

^{*} Taken from Table 130, *General Social and Economic Characteristics* at 661.

5. Non-white percent and percentage goal of the relevant labor force in each educational category:

To learn what percent of the relevant labor force in each category is non-white, and therefore what the non-white percentage goal for that category should be (PG), the court simply compared T() to the total number of *all* males 18 and over with () education (RLF).^b

$$\frac{T()}{RLF()} = PG$$

6. Total non-white percent and percentage goal of the relevant labor force:

The court multiplied PG(a) by 23.98%, PG(b) by 67.79% and PG(c) by 8.22%ⁱ and then added the three results to achieve the total non-white percentage goal in this case of 29%^j

^b RLF stands for relevant labor force. This data is readily available from the census reports. See Table 120, *General Social and Economic Characteristics* at 613.

ⁱ See note 27 *supra*.

^j The court finds it unnecessary to inflate the percentage goal because of the existence of a greater census undercount for Blacks than for whites. Any advantage the defendants thereby derive is counterbalanced by the advantage plaintiffs gain through the use of the more inclusive Spanish language data as a substitute for unavailable Spanish surname data.

UNITED STATES of America

v.

LOCAL 638, ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, COMPRESSED AIR, ICE MACHINE, AIR CONDITIONING AND GENERAL PIPEFITTERS, et al., Defendants.

No. 71 Civ. 2877

United States District Court,
S.D. New York.
July 7, 1972.

Action brought under Civil Rights Act of 1964. The District Court, Gurfein, J., held that though admissions procedures to apprenticeship training programs run by defendant committee did not discriminate against black and Spanish-surnamed applicants, past and present pattern of membership of defendant local, the practice as to work referral employed in hiring hall run by defendant local and practice by which defendant local admitted persons to membership in effect discriminated with regard to employment opportunity against black and Puerto Rican individuals by reason of their race, color and national origin, entitling the government to relief.

Judgment accordingly.

See also D.C., 347 F.Supp. 164.

Whitney North Seymour, Jr., U.S. Atty., S.D.N.Y., for United States of America by Daniel H. Murphy II, Joel B. Harris, New York City, of counsel.

Doran, Collieran, O'Hara & Dunne, New York City, for Local 40 and others by Robert A. Kennedy, Richard O'Hara and Ronald E. Guttman, New York City, of counsel.

Proskauer, Rose, Goetz & Mendelsohn, New York City, for defendant Allied Building Metals Industries by Michael A. Cardozo, New York City, of counsel.

GURFEIN, District Judge.

This is an action brought by the Attorney General of the United States in a complaint signed on July 29, 1971 under the Civil Rights Act of 1964 pursuant to authority granted to the Attorney General in that Act (Act of 1964, 42 U.S.C. § 20000e-6(a)). The defendants were four local unions in the building trades servicing metropolitan New York and their counterpart Joint Apprenticeship Committees and employee associations. By order of this Court, separate trials were ordered for each local union and its counterparts.

A separate trial has now been had to the Court in the case against Local 40. International Association of Bridge, Structural and Ornamental Iron Workers ("Local 40"), the Joint Apprenticeship Committee, Iron Workers Local 40 and 361 ("JAC") and an employer's association, the Allied Building Metal Industries ("Allied Metal").¹ Decision was reserved.

THE COMPLAINT

The complaint alleges that Local 40 is engaged in a pattern and practice of discrimination in violation of Title VII of the Civil Rights Act of 1964. It charges that Local 40 which has approximately 878 members² has only fifty non-white members (§12). All individuals employed by members of Allied Metal as structural iron workers must be members of Local 40 or hold valid work permits issued by Local 40. The JAC trustees are representatives of employers and union and they control the apprenticeship program for Locals 40 and 361 and determine which persons shall be admitted to the apprenticeship program (§14).

¹ Allied Metal is joined as a defendant for purposes of relief only pursuant to Fed.R.Civ.P. 19(a) (1).

² The Government now shows that there are 1229 members, but the union shows 244 of these are honorary or pensioners.

The pattern and practice of resistance to the full enjoyment by non-whites of rights secured to them by 42 U.S.C. § 2000e-2(c) and § 2000e-2(d)³ are alleged to consist, *inter alia*, of the following: (a) failing to admit non-white workmen into the union as journeymen members on the same basis as white; (b) failing to refer non-white workmen for employment on the same basis as white by applying standards of referral which have the purpose and effect of insuring referral priority to their members; (c) failing to recruit "blacks" for membership in and employment through the union on the same basis as whites are recruited; (d) failing to permit contractors to fulfill the affirmative action obligations imposed by Executive Order 11246 by refusing to refer blacks whom such contractors wish to employ; and (e) failing to take reasonable steps to make known to non-white workmen the opportunities for employment, or

³ § 2000e-2(c):

"Labor organization practices.

It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

§ 2000e-2(d):

"Training programs.

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

otherwise to take affirmative action to overcome the effects of past racially discriminatory policies and practices.

THE HISTORY

Local 40 is a hard-hat union of structural steel workers whose members were braving the heights of rising skyscrapers long before the hard-hat was used. Created in 1904, its members shared the prejudices of their time, stuck largely to their ethnic stock and surely discriminated against black persons, among others. Like most prejudice, it was probably made to appear justified on economic grounds of self-survival by otherwise decent hard-working folk. The union fostered nepotism and was, on the whole, a family oriented group. In this respect, Local 40 was probably not different from the other construction unions across the land.

It is unprofitable to assay in retrospect the relative strength of each of the coalescing factors that spelled discrimination. The net effect, suffice it to say, was an ugly discrimination against black workmen. It is this effect that the Congress sought to eliminate, or at least ameliorate, through the Civil Rights Act. The evils were well known and labor unions were singled out as special targets in the legislative desire to end discrimination in employment.

When the Civil Rights Act became effective in 1965, Local 40 had one black member, and he had been admitted toward the end of 1963, and one person of Spanish ancestry, admitted in 1948. That this was tokenism is apparent. But the union cannot legally be charged with discrimination practiced before the Civil Rights Law was enacted. It can only be charged with what it has done or failed to do since then. One must bear in mind, however, that we do not start with a clean slate, but with a chronic condition which it will obviously take some strong affirmative action to improve.

The union, in simple terms, contends that it has set itself to the task with a will and that it deserves no censure for its efforts. The Government, to some extent at least, must grudgingly concede that there has indeed been some progress, but

it maintains that the pace is too slow, that foot-dragging continues, and that the proof of the pudding is in the statistics. The union appears reluctantly to accept the use of statistical measurements, although it rightly argues that statistics alone should, in no event, be wholly determinative of its conduct. The Government stresses the results viewed objectively, while the union stoutly maintains that the asserted purity of its motives and its recent conduct must weigh heavily in the scale in favor of exculpation. With this background, let us try to see what has happened since 1965 when the Civil Rights Act came into being.

FINDINGS OF FACT

1. Local 40 is a labor organization within the meaning of 42 U.S.C. §2000e(d). It has more than 100 members and maintains a hiring hall, and is in an industry affecting commerce. (Stipulated)

2. JAC is a joint labor management committee within the meaning of 42 U.S.C. §2000e-2(d). (Stipulated)

3. Local 361 is a sister union of the same International whose jurisdiction covers Kings, Queens, Nassau and Suffolk Counties, while Local 40's jurisdiction covers Bronx, New York, Westchester and Richmond Counties. The craft jurisdiction is the same for both locals. (Stipulated)

4. In 1965, Local 40 had one black member, admitted in 1963 and one Puerto Rican member, admitted in 1948. (Stipulated)

Union Membership — "Bookman v. Permitmen."

5. There are two classes of workmen who may be employed under the industry-wide collective agreement. These are full fledged members of Local 40 in good standing — the "bookmen": and journeymen from other locals as well as workmen some of whom are equivalent in capacity to "bookmen" or possess skills necessary for a particular job assignment, but who have no union affiliation — the "permitmen." (Tr. 297-298: Ct. Ex. 1)

6. These men, if they get a job in the industry on their own or through the hiring hall, are permitted to work, after they get the job, under a permit granted by the union upon payment of a fee of \$2.50 per week to the union. (Tr. 27).

7. They receive the same pay scale as the bookmen, and receive certain fringe benefits like vacation pay. Their permitmen generally get their jobs through the union hiring hall. (Tr. 221-22)

8. Under the charter of the International Union permitmen must be qualified journeymen (Ex. FF50).

9. A welder certified by the City of New York may get a permit to work even though he is not qualified as a journeyman (Tr. 320-21), and there is a separate column on the daily hiring hall sheet where a workman can signify that he is a welder (Id.)

10. To be admitted to membership in any local union of the International, one must be a practical workman versed in the duties of some branch of the trade, of good moral character and competent to demand standard wages (Ex. 3, Constitution, Art. II, 2).

11. There is no record kept of the number of permitmen nor of the ratio of permitmen to bookmen.

12. By extrapolating the weekly cash receipts from the \$2.50 permit fee, one may, however, reasonably deduce the number of permitmen in a given period. The Government has attempted to do this and has arrived at an average of 580 permitmen, a figure I can accept as a fair approximation (Ex. 48A, Tr. 361, 298-301).

13. There were 1229 members of Local 40 at the end of April 1972, of whom 86 are apprentices. The active bookmen number about 903, the rest being honorary and pensioners (224 men) (Ex. 60). This means that the actual working population in this craft within the four counties included in the Local 40 jurisdiction is about 1480 persons, all of whom have the apparent capacity to do the work required, plus apprentices.

14. Not all of the 580 permitmen are seeking membership in Local 40, for many of them are members of other locals in the International. Of the non-members of Local 40 who applied for referral in the months of May and December 1971, out of a total of 1114 persons listed, 708 or 63% were not members of other locals (Ex. 34). The figure may be of little significance because the same name is repeated many times on the successive daily sheets when the person continues to be out of work. It tends to show, however, that, in aggregate, there are a considerable number of permitmen, apparently qualified to work, who are not members of the International union.

15. At the end of April 1972, the total non-white membership of Local 40 consisted of 40 "black" persons, 16 "with Spanish surnames," 6 "Orientals" and 66 "American Indians." There were 86 apprentices of whom about 14 (estimated) are black and Puerto Rican (Ex. 9, EEO-2 form for 1971, Part E; Ex. 11, Local 40 Membership Certificate for September 1971; Tr. 297 and Ct. Ex. 1).

16. That adds up to 128 non-whites out of 989 (including apprentices), or about 12.9%. Excluding the 66 Indians, however, the black and Puerto Rican group constituted 6.3% against the total population figure derived below of 23.9%.

17. The related population figures for the eight counties which are included within the jurisdiction of Local 40 and its sister union Local 361 (which have a joint apprenticeship and joint job rights program) are the following:

Total male population	5,368,436
Negro male population	854,933
Puerto Rican males (1/2 of total Puerto Rican population)	429,978
Combined Negro and Puerto Rican male population	1,284,911

(U.S. Bureau of the Census, Census of Population 1970, General Population Characteristics Final Report PC(1)-B34, Table 35, New York; Puerto Rican male population estimated from Pltf. Ex. 58A).

This indicates that Negro and Puerto Rican males are 23.9% of the total male population of the eight counties.*

18. On the other hand, there has been a positive increase in "membership" in Local 40 (excluding Indians) for blacks and Spanish speaking persons from 2 to 56, or 2800% in seven years.

19. We do not know the racial composition of the permitmen for they are a shifting group and records are not kept by race.

20. The method for electing journeymen to union membership as bookmen is, on its face, suspect. The applicant fills out a form which is readily given to all. He then is interviewed by the Executive Board of the union, all white, which determines whether his experience qualifies him to take the examination for membership. Only if he passes muster, can he take an examination given by an examination committee of the union, all white. The emphasis is on a practical test with no set form. There is also a written examination. No independent agency reviews the results (Corbett Dep. Ex. 47, pp. 104-09). Nor is there any written rule for processing the applications (Place Dep. Ex. 44, p. 70).

21. The written test is prepared by the coordinator of the JAC from books prescribed for apprentice training. The practical test consists of rigging up a block and tackle, pointing out the parts of a guy derrick from a blueprint; and tying up a number of knots and hitches using a piece of line and a two-by-four piece of wood (Place Dep. Ex. 44, p. 74).

22. The examinations are job-related.

23. In July 1966 there were 1048 members plus 62 apprentices for a total of 1110. Of these, 833 were journeymen and 215 "retired." In July 1971 there were 1137 members and 87 apprentices, a total of 1224, of which there were 903 journeymen

* The Court has taken only male population figures because there is no evidence that the Women's Liberation Movement has yet reached the level of the skyscraper.

and 234 "honorary and pensioners." In 5 years, then, the membership rose from 1110 to 1224, an increase of 114, and 155 vacancies were filled, making a total of new members of 269, except that there were 25 more apprentices at the end of the period, making the true figure 244. By extrapolation I find that 42 of the new members were black or Puerto Rican, or about 17.2% of the members admitted (see Ex. 60).

24. There were 100 black iron workers on the World Trade Center (Tr. 370) and 17 of them, who were City certified welders, were given welder's books in Local 40 (Tr. 369). There is no evidence whether any of the other black men on that job were already members of Local 40 though there may have been some. The union claims credit for this showing. Mr. Corbett testified that he felt that black welders who had not had enough experience to pass the journeyman's examination ought, nonetheless, to be allowed into Local 40. Under the union Constitution, if a man failed the journeyman's examination he was no longer permitted to work. To forestall such a peril, Mr. Corbett arranged for such men after two years of work as welders to be given welder's book membership in Local 40 without examination (Corbett Dep. pp. 319, 321-22).

It would not be fair, in any event, to resolve the issue of "bookmen" membership without considering the steps the union has taken to fulfill the mandate to act affirmatively. This requires us to explore another ground for the Government's complaint—recruitment practices.

Recruitment Practices

25. Contemporaneously with the effectiveness of the 1964 Civil Rights Act, the industry and the unions bestirred themselves to form a Joint Apprenticeship Committee (JAC), the avowed purpose of which was to recruit and train apprentices for this skilled and hazardous trade. The Ironworkers' JAC is a common apprentice program shared by both Local 40 and Local 361 (Tr. 222).

26. Apprentices are indentured to the JAC for a period of years.

27. The creation of the JAC was a part of the collective bargaining machinery and the trustee representation was joint. A trust fund was created on July 1, 1966 whose purpose was "to provide training for apprentices pursuant to the Standards of Apprenticeship and Training adopted by the trustees and to provide training and skill advancement for journeymen" (Ex. 2 § 2). The trustees are empowered "to determine the number of apprentices to be initiated into the apprenticeship program, taking into consideration the need for apprentices in the locality, the available job facilities for acquiring the necessary experience, and other relevant factors" (Id. Art. V, 1(b)). But the upper limit is fixed by the ratio of apprentices to journeymen as provided in the regulations of the International Constitution.⁵ It is incumbent on the trustees to establish minimum standards of education and experience required of apprentices and to pass on their qualifications, to arrange tests for determining the apprentice's progress in manipulative skills and technical knowledge and to arrange classes (Id.).

Decisions of the trustees are by majority vote requiring at least two concurring votes by union and employer trustees respectively. This has been amended to provide for unit voting.

To break a deadlock, a mutual person is to be selected by the trustees, or if they cannot agree, by the United States District Court for the Southern District of New York⁶ (Ex. 2, Art. VII § 5).

28. Standards of Apprenticeship have been promulgated. They provide that "selection of apprentices shall be made from qualified applicants on the basis of qualifications alone and without regard to race, creed, color, national origin, sex or occupationally irrelevant physical requirements in accordance with objective standards which permit review, after full and fair opportunity for application; and this program shall be

⁵ We have been unable to find such a ratio in the collective bargaining agreement. Mr. Corbett testified that the ratio is one apprentice to seven journeymen (Tr. 243, but see Tr. 346).

⁶ Art. VII, § 5 was later amended but not substantially for present purposes.

operated on a non-discriminatory basis" (Ex. 8 §7). An apprentice is required to work not less than 6000 hours of reasonably continuous employment in an approved schedule of work experience over a period of not less than three years, together with the required related instruction hours, consisting of an additional 144 hours each year. Upon successful completion, the apprentice is given a certificate as a journeyman.

29. Under this apprenticeship program the entering apprentice classes from 1968 through 1971 totalled 268, of whom 48 were black or Puerto Rican, or approximately 18% (Ex. 9).

30. A substantial percentage of the whites admitted to the apprenticeship classes are related by blood to journeymen members of Local 40 (about 30%) and presumably also to members of Local 361 (Place Dep. 206-09; 547-48).

31. While the figure of 18% shows a distinct improvement, it raises two questions: (a) whether the percentage is high enough to eliminate the earlier condition of discrimination, and (b) whether the high incidence of nepotism does not reflect a bias in the selection process.

32. The extent of nepotism cannot be determined unless one knows what percentage of the whites who *tried* to get into the program were blood relatives compared with the total number of white strangers. Second, there may be some hereditary factors, as there are certainly environmental factors, including motivation, which make the blood relative more likely to do well on the tests. But nepotism as a trade union policy is unhealthy, for while the rich may leave an inheritance for their children, the worker may not bequeath job seniority, for that will take a job from another who has no union "father." Nepotism tends to freeze out blacks because blacks do not have white relatives in the union.

33. The test for admission to the program comprise four elements, scored as follows: Aptitude, 30; Physical, 40; High School Diploma or equivalent, 5; and Interview, 25 (Steinberg Dep. Ex. 46, p. 75).

34. While any test which includes an oral interview is presumptively suspect, the Government did not produce any evidence reflecting on the quality of the examinations, though some of the "personality characteristics important in apprenticeship" are susceptible to conscious or even unconscious discrimination (Ex. 46A; Subex-7).

35. There is evidence that white persons, even relatives, have failed the test (Ex. H).

36. The tests have been administered by Stevens Institute of Technology for the mechanical aptitude test and by Professor Balquist of Columbia University for the physical test (Tr. 382). The tests are marked by the independent persons mentioned (Tr. 379-83; Ex. 46, pp. 24, 30-6). There has been no showing that the tests are not job related.

37. In the 1970 apprentice class examinations, 164 whites (out of 238 who had filled in application blanks) appeared for interview after passing the physical and aptitude tests. Of these 147 or 89% were accepted. 55 Black and Puerto Rican men (out of 106 who filled in the application blanks) appeared for interview after passing the physical and aptitude tests. Of these 40 or 72% were accepted. In so small a group (assuming individual differences not adjusted by random sampling) one can hardly find purposeful discrimination in these percentages without further evidence.

38. The Government has not adduced proof that blacks and whites bunched closely together in grades on the basis of aptitude and physical examinations have been graded in a discriminatory fashion on the oral interview.

39. Absent such proof, it would be unwarranted to assume discrimination based solely on *composite* results which include the scoring on the interview test.

40. The Government has not asked for a finding that the examinations were an "unnecessary barrier," to apprenticeship, for it is difficult to find evidence in this record to support that

conclusion. (See Ex. 46A, 7: Steinberg Dep. pp. 51-7; Govt. Br. p. 6),

41. The only examination that is suspect from its very lack of objective standard, the oral interview, is to be eliminated in the future, according to Raymond Corbett, Business Agent of the union (Corbett Dep. 371).

42. Without any evidence, the Court cannot assume that the independent testing agencies conducted examinations that were not job related.

43. Non-white apprentices are affirmatively recruited by JAC. The program is made known to minority and community action groups who disseminate it to the black and Puerto Rican community (Steinberg Dep. 383-85). The Workers Defense League, one of the minority community action groups, in turn, has disseminated the information by radio, television and through local newspapers (Johnson Tr. 437-38).

44. The Government bases its essential claim of discrimination in the selection of apprentices on the "weeding out" process.

45. There is no doubt that 45% of the applications for the 1970 examination were issued to non-whites (Tr. 401-2), which tends to show a fair coverage of the minority community. The JAC claims credit for this result.

46. The Government notes that while only 54% of the persons who *received* applications were white, 85% of the first apprentice class out of the 1970 list was white, and 80% of the second class was white. I find the relevant figures to be not those who *received* application blanks but those who *returned* them filled in. That is, 238 whites against 115 all others. The whites returned 67% of the blanks, the true starting point.

47. Why people have a change of heart on enlisting in the program is not susceptible of direct proof. We assume that it is not an average person who is willing to climb a ten foot steel column fifty stories high. It may be that when the dimensions of the job are sketched ardor cools, and dropping out seems to

some persons, white or black, more sensible than continuing. The Project Director for the New York Plan, himself a black, approved the requirement of a showing of motivation to avoid later disappointment (Johnson Tr. 439-41). A drop-out under these circumstances bears no stigma. Nor does the JAC for making the offer. In short, I find a lack of evidence to support a contention that the JAC, subtly or otherwise, encourages non-whites to drop out of the program.

48. The second part of the process — the tests themselves, obviously cannot guarantee a passing mark for all, nor for any ethnic or racial group, unless they are "fixed" or so devised as to overemphasize information or skills that minority members are likely to possess.

49. Here there appears to have been a rejection of the use of verbal criteria that are unfair to those with a weaker education.

50. The union also suggests as another indication that its heart is in the right place: its voluntary participation in the New York Plan for the training of minority individuals who are ineligible for the apprentice program because they are overage (431-34). Here blacks or Puerto Ricans are taken for training even though they are above the maximum apprentice age of 28; they are assigned to state and city jobs under the Plan, and when these jobs peter out, the union finds them private employment (Corbett Dep. 314-15).

51. There are 33 persons assigned to Local 40 under this program, of whom 15 are currently engaged on projects (Corbett Dep. 314-16).

52. Mr. Corbett testified at some length about these and other steps he had taken to procure more minority employment with the aim of making them union members. I was impressed with his sincerity and I cannot find that there has been purposeful discrimination in the apprentice program.

COMMENT

[1] It is not only active discrimination, however, that gives claim to relief. Unintentional discrimination also runs afoul of the law. In the words of Chief Justice Burger: "...[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971). See *Chance v. Board of Examiners*, 458 F.2d 1167 (2 Cir. 1972).

We now turn to the claim that the referral procedures of the union are discriminatory.

The Referral Practice

53. The union operates a hiring hall. There bookmen, unaffiliated permitmen, and men from other locals shape up every morning to be assigned to such jobs as are available. The Assistant Business Agent in charge of the hiring hall receives calls from employers who tell him the number of men that are needed and whether they require any of the special skills listed in Finding 54.

54. The positions filled for the hiring hall vary in the requirements of experience, skill and agility. Most structural workers can do every phase of the work (Ex. 44, p. 8). In the construction of high rise buildings the jobs may be roughly categorized as follows: (1) a raising gang consists of six or seven men in the setting of structural steel (Place Dep. 32). This gang sets the steel. Its members must know how to work with cranes or derricks. They must be able to bolt up the steel and plumb the building up, read prints to know the steel is being put in the right place, and understand safety requirements (Ex. 44, Place Dep. 7-8). (2) A raising gang normally has two men working as connectors. The steel is sent up to them and they connect the horizontal piece and the vertical piece (Ex. 44, p. 13). There is also a foreman or "pusher" and a bell man who signals the engineer on the derrick, as well as a hooker on and a tag

line man (Ex. 44, p. 26). (3) A demolition gang is similar to a raising gang, but they take a building down (Ex. 44, p. 29). (4) A plank man lays a floor between horizontal beams of steel set up by the raising gang (Ex. 44, pp. 20-21). (5) A decking gang welds a steel deck floor that is put down after the steel is raised and set (Ex. 44, p. 22). (6) A burner tailors the fabricated steel to the particular needs of the job (Ex. 44, p. 24). (7) Welders do the welding procedures. They must be certified by the City of New York (Ex. 44, p. 29). (8) A layout man prepares the insertion of reinforcing steel (Ex. 44, p. 34). (9) A bolter up gang follows the raising gang and puts permanent bolts in the structure in advance of the plank man (Ex. 44, p. 34). (10) A plumber-up plumbs the columns to make sure they are plumb with all the lower columns (Ex. 44, p. 36). (11) A hod hoist tower man constructs the temporary elevator on the side of the building that carries materials. A hod hoist tower gang consists of two ironworkers and two carpenters. (12) An all around bridge man can do all of the above including welding (Ex. 44, p. 38).

55. The men looking for jobs sign their names on either of two sheets. One is marked "Local 40 only;" the other is for non-members of Local 40, and is marked "Permit-and other locals."

56. Anyone who is qualified as a journeyman or as a welder (in which case he signifies his specialty), regardless of race, may sign and wait.

57. He does not wait his turn, however, for the Business Agent makes his own determination of who goes where. Justification is offered for failing to follow the "first in first out" rule. It is said that employers often ask for particular men or at least men fitted to a particular job. And it is quite evident that, even without a formal rule, bookmen are referred to jobs ahead of permitmen or members of other locals. Mr. Place, the manager of the hiring hall, conceded that Local 40 men are sent out first (Place Dep. Ex. 44, p. 59).

58. This results in a *de facto* discrimination against blacks and Puerto Ricans because there are not enough of them in the

priority status of bookmen. The power wielded by the director of a hiring hall is, in the absence of an ombudsman on the scene, very great indeed. His conscience, or the collective conscience of the business agents, is the sole censor of preferential treatment for those he favors. A court obviously cannot monitor such a referral system on a daily basis.

59. The evidence fell short of establishing actual discrimination in the referral procedure. Several black men testified that they waited long and wearily for weeks without being sent to jobs, but they could not tell whether the white men sent out were "book" men or "permit" men (Tr. 72, 88, 101, 111, 173-4, 289, 290). And blacks testified that they were sent out while white men were not (Tr. 78, 82, 110, 116; see Tr. 185). One can understand the anguish of the black man where he sees whites being sent out without class identification as part of a process that, at best, he cannot see or touch. Anyone who has waited in a strange physician's office knows the feeling of uncertainty whether some other person in the waiting room has not been called out of turn.

60. The union protests that its criteria are objective and unrelated to race. Since no lists are kept by race, one cannot reconstruct a day in the hiring hall.

61. Though the Government requires local unions which run hiring halls to report, by minority categories, the applicants for referral and the numbers referred, the evidence in this record is sparse. Only one of these EE03 forms in evidence is sufficiently filled in to be of some help. The form filed by Local 40 for the two month period October and November 1971 reveals the following (Ex. 9):

There were 1999 applicants for referral of whom 131 were "Negro and Puerto Rican" and 24 were "American Indians," a total of 155 minority persons who constituted slightly less than 8 % of the total number of applicants. A total of 860 persons were "referred," of whom 42 were "Negro and Puerto Rican" and 10 were Indians, a minority total of 52. The white persons referred were, therefore, 808 in number against 1844 white

applicants. The whites thus obtained 43 % referrals, while the non-whites were given about 33 % referrals. Put another way, although non-whites were 8 % of the applicants, they constituted 6 % of the referrals.

Even without considering that Local 40 *members* are preferred in referrals, the figures, if true, hardly show an active pattern and practice of discrimination in referral.

62. We do know, moreover, that there are about 580 journeymen and welders who have successfully sat in the hiring hall and obtained jobs by referral. Some of them, though not many according to visual testimony, are black and Puerto Rican. A substantial number have indicated their desire to join the union.

63. In summary, we find a situation in which honest efforts have been made by the union to ameliorate the condition of discrimination, but where the practice of referral still discriminates in favor of *union members* who, as a result of past policy, are predominantly white.

DISCUSSION

In the light of the evidence available, there appears to be no active discrimination against blacks and Puerto Ricans in the apprenticeship program or in referrals from the hiring hall. Yet there is a residuum of discriminatory effect stemming from the earlier practices of discrimination, the failure to accelerate minority journeymen membership, and the continuance of a referral system that has a built-in priority for Local 40 journeymen members against all others in the hiring hall.⁷

⁷ The hiring hall is sanctioned for the building and construction industry, 29 U.S.C. § 158(f). See *Local 357 v. NLRB*, 365 U.S. 667, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961). Preference may not be given to union members to pressure others to join. But that is not in issue here. Here the preference is alleged to be exercised without permitting minority persons to eliminate it by simply joining the local union.

[2,3] The absolute ratio of minority members in the union to the whole membership is, in relation to the matrix of population, of some significance. Statistical evidence can make a prima facie case of discrimination. *Parham v. Southwestern Bell Telephone*, 433 F.2d 421, 426 (8 Cir. 1970). "...[A] small black union membership in a demographic area containing a substantial number of black workers raises an inference that the racial imbalance is the result of discrimination ..." *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9 Cir.) *cert denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971), citing *United States v. IBEW, Local No. 38*, 428 F.2d 144, 151 (6 Cir.) *cert denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970). The question of what is a "small" membership in relation to black workers in a demographic area is a question of degree. A one-to-one ratio of membership to population is not required.

The *Ironworkers Local 86* case, *supra*, affords an illustration of the difference between the extreme situation there and the situation here. In that case, Judge Lindberg found that in January 1970, Local 86 had about 920 members, only one of whom was black; Local 32 had about 1900 members, only one of whom was black. The sheet metal workers JATC had 100 apprentices indentured in its program and only seven were black. Plumbers JATC had 104 apprentices and none were black. The situation confronting Judge Lindberg was like Local 40's situation in 1965. In his case, however, no progress had been made in more than four years.

In *United States v. Sheet Metal Workers*, 416 F.2d 123 (8 Cir. 1969), Local 36 had at date of trial, June 1967, 1275 white members and no Negro members. It accepted its second and third Negro apprentices in 1967. There was no record of any Negro having used its hiring hall prior to the date of trial. 416 F.2d at 128.

In *United States v. IBEW, Local 38*, *supra*, as of the date of the complaint the local union had 1318 members, of whom 2 were Negroes, and 255 apprentices of whom 3 were Negroes. In the preceding year it had referred 3487 persons for work

through the hiring hall, only 2 of whom were Negroes. 428 F.2d. at 151.

[4] Although the statistics in the case of Local 40 do not compel a conclusion that there is present active discrimination, it is now clear that quite neutral practices which have the effect of discriminating because of past history impose a duty on the District Courts to change them. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2 Cir. 1971); *United States v. IBEW, Local No. 38*, 428 F.2d 144 (6 Cir. 1970); *United States v. Sheet Metal Workers*, 416 F.2d 123 (8 Cir. 1969); *Local 53 v. Vogler*, 407 F.2d 1047 (5 Cir. 1969).

[5] Although the Civil Rights Act appears to provide that preferential treatment (by a quota system) is not to be granted on account of existing number or percentage imbalance based on population ratios, 42 U.S.C. § 2000e-2(j), the courts have determined that the statute merely prohibits a requirement of "preferential treatment" *solely* because of an imbalance in racial employment existing at the effective date of the Act. *United States v. IBEW, Local No. 38*, 428 F.2d 144, 149 (6 Cir. 1970); *Sheet Metal Workers, Local 36*, *supra*; *Dobbins v. Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968). If it were held otherwise, it would be too easy to draft seemingly innocuous provisions for membership or work referral which would, because of history, freeze blacks and other minority people into a perpetual state of inability to comply with them. See, e.g. *Local 53 v. Vogler*, 407 F.2d 1047, 1054 (5 Cir. 1969). The test is whether the practices in question have any present discriminatory effect. *United States v. Dillon Supply Co.*, 429 F.2d 800 (4 Cir. 1970).

Chief Justice Burger in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971) said: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if

they operate to 'freeze' the status quo of prior discriminatory employment practices" (emphasis supplied).

[6] In the present case one cannot escape the conclusion that the industry can employ, in normal times, more than the journeymen membership of Local 40. It appears that probably more than half of the non-members of Local 40 who appear in the hiring hall looking for work are unaffiliated. The artificial limitation of union or apprentice membership far below the number necessary for the particular trade is, itself, a discriminatory pattern or practice in a context involving a predominantly white union with a past history of discrimination. See *Local 53 v. Vogler*, 407 F.2d 1047 (5 Cir. 1969); *United States v. Local 638, et al.*, 337 F.Supp. 217 (S.D.N.Y.1972); *United States v. Local No. 86*, 315 F. Supp. 1202 (W.D.Wash. 1970), *aff'd*, *United States v. Ironworkers Local 86*, 443 F.2d 544 (9 Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

It is true that Local 40 has not specifically said that to obtain priority in referral one must have been employed for a number of years under the collective bargaining agreement as was the requirement in some other cases. Cf. *Equal Employment Opportunity Commission v. United Association of Journeymen, etc.*, 311 F.Supp. 468 (S.D.Ohio 1970), *vacated*, 438 F.2d 408 (6 Cir.), *cert. denied*, 404 U.S. 832, 92 S.Ct. 77, 30 L.Ed.2d 62 (1971); *United States v. Sheet Metal Workers*, 416 F.2d 123 (8 Cir. 1969). In that sense there is not overt discrimination against blacks. But the effect of giving priority to Local 40 members in referral is the same, because of the racial imbalance in membership. Without court intervention, even the voluntary acceleration of minority membership could be matched by equivalent new white membership, thus retaining the relative status quo.

[7] On the other hand, to grant an absolute preference in employment to minority persons, which has the effect of depriving employment of white persons of higher qualifying standing may itself be unconstitutional. The Eighth Circuit was recently confronted with this difficult problem in a civil rights case

under 28 U.S.C. §§ 1331, 1343(3) and (4). *Carter v. Gallagher*, 452 F.2d 315 (8 Cir. 1971), modified after rehearing en banc (1972). The District Court had ordered the Fire Department of Minneapolis to give *absolute preference* in Fire Department employment to twenty minority persons who meet the qualifications for the position. A panel of the Court of Appeals reversed the order upon the ground that it unconstitutionally discriminated against whites under the Fourteenth Amendment and § 1981 of 42 U.S.C.A. The Eighth Circuit, sitting in banc, held that such an absolute preference "does appear to violate the constitutional right of Equal Protection of the Law to white persons who are superiorly qualified." 452 F.2d at 328. It distinguished cases where particular minority persons had been discriminated against and considered that the immediate employment of such persons could be ordered. But "in dealing with the abstraction of employment as a class," *id.*, the constitutional problem does arise. Although theirs was not a Title VII case, the Court accepted as practical guidelines remedies fashioned in Title VII cases. It then noted that the Ninth Circuit had approved a decree ordering building construction unions to offer immediate job referrals to previous "racial discriminatees" and also had approved a protective order requiring the unions to recruit sufficient blacks to comprise a 30% membership in their *apprenticeship* programs. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9 Cir.) *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971). It also cited instances under Executive Order No. 11246 where *percentage* goals for the employment of minority workers were sustained. The Court then noted that "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination." 452 F.2d at 330. To accommodate the "conflicting considerations" the Court said: "[W]e think some reasonable ratio for hiring minority persons who can qualify under the revised qualification standards is in order for a limited period of time, or until there is a fair approximation of minority representation consistent with the population mix in the area." The Court was careful to state that this was not a "quota" system, because as soon as the order is

fully implemented, all hirings would be on a racially non-discriminatory basis. *Id.* The Court of Appeals, therefore, determined that one out of three persons hired by the Fire Department shall be a minority person until at least twenty minority persons are hired.

This extensive discussion of *Carter v. Gallagher* is warranted, perhaps not only because it is so recent, but because it points up the delicate constitutional discrimination that can be involved in the granting of absolute preferences.

The case of admission to membership in a labor union is, however, a step removed from the civil service list in a municipality. Here there is no state law, as there is in civil service, mandating the order of appointment from a list based on relative qualification by examination. Nor is membership in a union equivalent to actual appointment or employment. It is a step to employment and, while in the long run an increase in membership may mean less jobs for whites as a group, it does not penalize a particular white who has a priority status for a particular vacancy. It is, therefore, easier, in a union membership case, to adopt a ratio of minority to non-minority increase in membership until a relative balance is achieved.

RELIEF

There are several possibilities for relief: (a) to require the union to appoint an ombudsman for minority workers; (b) to abolish the priority status of bookmen and put everyone in the hiring hall on a "first in first out" basis; or (c) to increase the union membership enough so that there would no longer be any group discrimination even if the present referral practice is kept.

While the idea of requiring an ombudsman has occurred to the Court, *sua sponte*, it could cause difficulty in the smooth working of the referral system. For there must be an element of judgment in determining which workman fits which job, and one can prophesy endless disputes on a matter so incapable of resolution by objective standards.

The same difficulty attends the strict application of a "first in, first out" rule which would make a single list of bookmen and permitmen and send them out in the order of signing in. A single list could be ordered, it is true, with a direction to the hiring hall manager not to discriminate in favor of members. This method, even if it were enforceable by a court, in a practical sense, would discriminate against bookmen (including the black, Puerto Rican and Indian bookmen) in favor of the permitmen, most of whom are also white.

The practical answer is to increase the non-white membership in Local 40. While there is no mandate to achieve a precise racial proportion to the population, the difficulties inherent in the referral system and the numerical inadequacy of the apprenticeship and training programs, regardless of fault, indicate that at the present rate it will be long before a rough equality is achieved. But more important, there are blacks and Puerto Ricans *now* who are presumably qualified journeymen, as evidenced by their acceptance as permitmen, and who want to join Local 40. Objective examinations should be open to them at once.

CONCLUSIONS OF LAW

1. Local 40 is a labor organization within the meaning of 42 U.S.C. § 2000e(d) and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. § 2000e(e).

2. Ironworkers JAC is a joint labor-management committee controlling apprenticeship training within the meaning of 42 U.S.C. § 2000e-2(d).

3. The Court has jurisdiction over this action by virtue of 42 U.S.C. § 2000e et seq. The Attorney General is authorized under the Civil Rights Act of 1964 to institute suit to enjoin a pattern or practice of discrimination and request such relief as may be necessary to insure the full enjoyment of rights described in Title VII. 42 U.S.C. § 2000e-6(a).

[8] 4. The Government has established a *prima facie* case that defendant Local 40 has pursued a pattern and practice of conduct with respect to employment opportunities in the construction industry which has, in effect, denied to black and Spanish-surnamed workers the same opportunities available to whites.

[9] 5. Local 40's policies for admission of members and for referrals for work, which the Government has established as having the effect of perpetuating past discrimination, are unlawful.

[10] 6. Local 40's policy of keeping its membership small in order to guarantee work opportunity for its present members has the effect of perpetuating past discrimination and is, therefore, unlawful.

[11] 7. The admissions procedures to the apprenticeship training programs run by defendant JAC, do not discriminate against black and Spanish-surnamed applicants.

8. The past and present pattern of membership of Local 40, the practice as to work referral employed in the hiring hall run by Local 40, and the practice by which Local 40 admits persons to membership in effect discriminate, with regard to employment opportunity, against black and Puerto Rican individuals by reason of their race, color and national origin.

9. Plaintiff, United States of America, is entitled to judgment ordering the following:

UNION MEMBERSHIP RELIEF

[12] 1. All resident black and Puerto Rican city certified welders shall, upon application, promptly receive a welder's book in the union.

2. They shall also have the right to take the journeyman's examination, independently administered, on payment of equivalent dues and initiation fees, after 2 years of work, consisting of at least 1000 hours.

[13] 3. All other resident blacks and Puerto Ricans with 3 years' experience, consisting of at least 1200 hours, shall be permitted, upon application, to take the impartial journeyman's examination, provided for below, the experience to be verified by the impartial examiners. Experience outside New York City or on non-union jobs shall be accepted as stated by the applicant, subject to post examination check.

4. The term "Puerto Ricans" shall include former residents of the Carribbean area and Central America.

5. There shall be three examiners who shall constitute the examining board: one from the Engineering School Faculty of Columbia University; one from the faculty of Stevens Institute; and one from an accepted aptitude testing service. They shall be nominated to the Court by the Government and Local 40, and if the parties cannot agree, the Court will appoint them.

6. The union shall pay the fees of the impartial examiners.

7. The tests shall be job related and the examiners shall perform what in their discretion may be necessary validating procedures.

8. Only blacks and Puerto Ricans, and those whites whose applications for book membership are pending at the date of this opinion shall be eligible for the first examination.

9. All who pass the first examination shall be initiated to membership in the Local without a vote by the membership upon their payment of equivalent dues and initiation fees.

10. The date and qualifications for taking the examination shall be publicized in minority media with the statement that it is open at this time only to blacks and Spanish name persons, as well as to those white persons who have applications pending at the date of this opinion.

11. Notice of the holding of the examination shall be sent to all permitmen whose addresses are known, so that minority

persons among them will learn of the examination and the qualifications therefor, including the status of race and national origin mentioned above. The Government may review the lists compiled by the local union and suggest additional names which should properly be on the list.

12. A failure to pass the examination shall not deprive the man of his right to continue to work as a permitman, unless the examining board finds him so unskilled that it is unproductive for an employer to hire him or that he is a hazard to himself or others.

13. Similar examinations for journeymen book membership, based upon the foregoing qualifications, shall be held at least every six months for the next four years (with adequate notice to file applications therefor), under the supervision of the independent examiners or their successors. Each applicant who meets the prerequisites for taking the examination shall be given at least two weeks' notice of the date and place of examination and the nature of the examination.

14. The Court reserves jurisdiction to pass on the validity of the examination and the procedures for notice, upon application by either party.

15. Local 40 shall maintain, for two years after any examination, complete records of the examination, including, but not limited to, all applications for membership; copies of all notice sent to applicants; copies of any replies received from applicants; copies of the examination administered and score sheets for the examination; and if the examination is practical, summaries of the applicant's performance detailed enough to allow independent review.

REFERRALS

[14] 1. All applicants for referral to jobs including members of Local 40 shall fill in a master card which permits checking, by job categories, those jobs for which the applicant considers himself qualified. The master card shall include spaces for

address, age, race or nationality, whether applicant owns a car, and any special license he may possess, such as a New York City Certified Welder's Certificate. It shall also provide for a statement of years of experience in the structural steel industry, with the names of former employers.

2. The Business Agent of Local 40 or either of his assistants shall mark the applicant as "qualified" or "not qualified by experience" for each category of the jobs described on the master card. Such evaluation shall appear in writing on the master card of each applicant, with the date of evaluation. If the Business Agent or his assistants cannot make such evaluation as to a particular applicant, they shall note in the job category "unknown" together with date. If the Business Agent or his assistants believe the applicant unfit for a particular job category because of age, lack of experience or for other reasons, the evaluation shall be stated in writing, the reason being particularized.

3. The first time an applicant for referral visits the hiring hall, he shall be required to fill in the master card as a prerequisite to job referral.

4. The master cards shall be retained as a permanent record in the hiring hall, and any applicant for referral shall, upon request, be shown his own master card and the evaluation of the business agents. He shall be given an opportunity, if he so requests, to challenge the evaluation of the business agents and they shall afford him a fair hearing.

5. All requests by contractors for work referrals shall be recorded in a bound book which shall reflect: (a) the date of the request; (b) the person and the firm making the request; (c) the nature of the request; (d) the address of the job; and (e) the names of the persons assigned pursuant to said request, with a notation of color or national origin (which may be visual if applicant refuses to state).

6. The work referrals shall be made without regard to race, color or national origin, and with reference only to job experience and qualification.

7. Until the successful applicants for the first examination described above shall have been initiated, the present practices of referral shall be suspended. That is, no priority shall be given to book members of Local 40 until further order of the Court.

8. All persons referred for employment must appear in person at the hiring hall.

9. After the initiation of new minority members aforesaid, based on the first examination, Local 40 may apply to the Court for a modification of the order respecting referral practices.

The United States and Local 40 shall confer on the drafting of an order in conformity with this opinion. If the parties cannot agree, each party shall submit an order upon notice. If a further discussion with the Court is required, the parties may make such request.

The foregoing numbered paragraphs are the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

Submit order as above provided.

UNITED STATES of America,
Plaintiff,

v.

LOCAL 638, ENTERPRISE ASSOCIATION OF
STEAM, HOT WATER, HYDRAULIC SPRINKLER,
PNEUMATIC TUBE, COMPRESSED AIR, ICE
MACHINE, AIR CONDITIONING AND GENERAL
PIPEFITTERS, et al., Defendants.

No. 71 Civ. 2877.

United States District Court,
S.D. New York.
June 14, 1972.

Federal civil rights action against unions wherein city human rights commission sought to intervene. The District Court, Gurfein, J., held that commission could not intervene of right but could intervene by permission, on basis of common questions of law and fact, and that there would be ancillary jurisdiction of commission's claim.

Order Accordingly.

See also D.C. 337 F.Supp. 217 and 347 F.Supp. 169.

J. Lee Rankin, Corp. Counsel for intervenors by Beverly Gross, Steven J. Sacks, New York City, of counsel.

Whitney North Seymour, Jr., U.S. Atty. for plaintiff by Howard S. Sussman, New York City, of counsel.

Cohn, Glickstein, Lurie & Ostrin, New York City, for defendant Local 28 by Sol Bogen, Daniel W. Meyer, New York City, of counsel.

GURFEIN, District Judge.

MEMORANDUM

The New York City Commission on Human Rights (the "City Commission") seeks to intervene as an additional party plaintiff in an action brought by the Attorney General of the United States, pursuant to Section 707(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a), against four local unions in the building construction industry in New York City which the Attorney General charges with having engaged in a pattern of discrimination against blacks and Puerto Ricans. One of the defendant unions is Local 28 of the Sheet Metal Workers International Association ("Local 28"). For purposes of trial, the action has been divided into four parts, the case against each local union to be tried separately. The consideration of the proposed intervention by the City Commission will be limited to the part of the action that is against Local 28, which does not oppose permissive intervention. Regardless of this consent, the Court must find jurisdiction to exist in order to permit the intervention.

I

Intervention may be considered either under Rule 24(a) or 24(b), the City Commission having moved in the alternative.

Rule 24(a) deals with intervention of right. That rule provides that "anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[1] I cannot find that the interests of the residents of New York are not adequately represented by the Department of Justice of the United States. Yet this would have to be a necessary finding to permit intervention as of right. There is no evidence to support such a finding. Cf. *Trbovich v. United Mine Workers*,

404 U.S. 528, 538 n. 10. 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). In any event, a broad construction of the word "transaction" in order to allow intervention *of right* seems undesirable. It is better to consider permissive intervention under Rule 24(b), so that the District Court is not bound to accept intervention by cities or their agencies, as a matter of right, in the variety of cases that come before this Court.

[2] I recognize that, from the point of view of federal jurisdiction, the former would be the easier course to take. For in the case of an intervention of right, independent federal jurisdiction is not required whether jurisdiction in the original action is based on diversity of citizenship or on a federal question. See *United States to Use and for Benefit of Foster Wheeler Corp. v. American Surety Co. of New York*, 142 F.2d 726, 728 (2 Cir. 1944); 3B Moore's Federal Practice ¶ 24.18[1] (2d ed. 1969).

II

[3] The proposed intervention may, however, be considered as a permissive intervention under Fed.R.Div.P. 24(b). There is no "statute of the United States [which] confers a conditional right to intervene" (Rule 24(b) (1)), nor does any party, strictly speaking, rely for ground of claim or defense upon a statute or executive order administered by the intervenor or any regulation (etc.) thereunder (Rule 24(b)). The action is exclusively based on a federal statute, the Civil Rights Act of 1964, which is not administered by any state agency and certainly not by the City Commission. But, in my opinion, the other ground for permissive intervention does exist here: "when an applicant's claim or defense and the main action have a question of law or fact in common" (Rule 24(b) (2)).

[4] We start with the proposition that "[Rule 24(b) (2)] plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459, 60 S.Ct. 1044, 1055, 84 L.Ed. 1293 (1940).

[5,6] Second, where the interest of the intervenor "is a public one" the "claim or defense" in Rule 24(b) (2) founded upon this interest has a "question of law in common with the main proceeding." *Id.* 310 U.S. at 460, 60 S.Ct. at 1055.¹ The legal issues in the federal action are substantially the same as those which the City Commission is charged with determining as an administrative matter. "Although the rule speaks in terms of a 'claim or defense' this is not interpreted strictly so as to preclude permissive intervention" where "the legal issues are the same." *Nuesse v. Camp*, 128 U.S.App.D.C. 172, 385 F.2d 694, 704 (1967); see Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv.L. Rev. 721, 733-34, 759 (1968).

[7] After the Attorney General brought this action, the City Commission started an administrative proceeding against Local 28 by filing a charge of discrimination against it. The charge was that Local 28 had engaged in unlawful discriminatory practices in violation of the Administrative Code of the City of New York, Chapter I, Title B (the City Human Rights Law), specifically with respect to its membership, referral and apprenticeship practices. This federal action would not necessarily stop the City Proceeding. The Congress has specifically disavowed an intent to occupy the field to the Exclusion of state or local laws on the same subject matter. 42 U.S.C. §§ 2000h-4, 2000e-7.

The City Commission, however, seeks to intervene in the federal action on the ground that a decree of this Court ultimately would supersede to some degree its own administrative order, and that the status of the City as a regular contracting party with the construction industry gives it a direct financial interest in any order this Court may make. If intervention is granted, the Commission plans to discontinue its administrative proceeding. The City Commission also notes that the voluntary

¹ Although there the Commission sought to intervene in a proceeding under Chapter XI of the Bankruptcy Act, the holding affords an analogy to the case at bar.

"New York Plan," designed to increase the representation of minorities within the construction trades and adopted in accordance with Presidential Executive Orders 11246 and 11375, may be affected by the federal case and that this might subject the City to federal sanctions. It alleges that Local 28 is the only construction union in the City which has refused to sign the Plan. Finally, the City Commission seeks to intervene in order to protect the City's citizens from racial and ethnic employment discrimination.

Permissive intervention seems justified in the circumstances. Intervention would permit the City to offer evidence and suggestions to the Court, which might be helpful in this difficult and delicate area. There is no reason to believe that intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

III

Having chosen the harder course of considering permissive jurisdiction, the question of subject matter jurisdiction must be assessed.

The statute which specifically authorizes the Attorney General to bring this action, Title VII, § 707, 42 U.S.C. § 2000e-6, is silent on the question of intervention. The companion section relating to actions brought by the "aggrieved person" provides that the Court may stay its own proceedings to permit the state or local authority to remedy the practice alleged; Title VII, § 706(e), 42 U.S.C. § 2000e-5(e).² No such stay is provided in actions brought by the Attorney General under Section 707. That federal jurisdiction is mandated in such suit, without regard to state remedies, does not mean, however, that a companion proceeding by the state must be permitted to go on while the federal action proceeds. Two courses of action to avoid such a contretemps are apparent: (1) to enjoin the City Commission

² That subsection also provides for intervention by the Attorney General in certain cases brought by the aggrieved person.

proceeding; or (2) to permit intervention by the City Commission in the federal action.

[8,9] Whether this Court has jurisdiction in the first instance to halt the City Commission proceeding by injunction need not be decided. *CF. McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Carter v. Carlson*, 144 U.S.App.D.C. 388, 447 F.2d 358, 368-369 (1971) cert. granted *District of Columbia v. Carter*, 404 U.S. 1014, 92 S.Ct. 683, 30 L.Ed.2d 661 (1972); *Adams v. City of Park Ridge*, 293 F.2d 585, 587 (7 Cir. 1961). For I believe that there is subject matter jurisdiction which makes the intervention permissible. That result stems from the doctrine that if the suit proposed to be initiated by the intervenor is "ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved." *Local Loan Co. v. Hunt*, 292 U.S. 234, 239, 54 S.Ct. 695, 697, 78 L.Ed. 1230 (1934).³ This Circuit has stated that an ancillary suit may be maintained, *inter alia*, "[t]o prevent the relitigation in other courts of the issues heard and adjudged in the original suit." See *Pell v. McCabe*, 256 F. 512, 515 (2 Cir.), *aff'd*, 250 U.S. 573, 40 S.Ct. 43, 63 L.Ed. 1147 (1919).⁴ If a court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit. Neither the citizenship of the parties, nor the amount in controversy, nor any other factor that would ordinarily determine jurisdiction, has any bearing on the right of the court to entertain that proceeding." *Id.* quoting 2 Street's Federal Equity Practice § 1229.⁵

³ Or for that matter, without regard to any other jurisdictional prerequisite. See Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 Harv.L.Rev. 657, 662-64 (1968).

⁴ It is not considered to be of significance that the City litigation is not technically a court proceeding.

⁵ The same notions of dependence which formerly gave jurisdictional support for an ancillary suit in equity tend to support ancillary jurisdiction for (footnote continued)

The same result, I believe, is authorized in this motion for permissive intervention under Rule 24(b) (2), even where no independent basis for federal jurisdiction exists.

The Supreme Court has not determined whether, and in what circumstances, permissive intervention may be allowed in the absence of an independent basis of federal jurisdiction. Professor Moore, however, has stated his view of Rule 24 in categorical fashion:

"Intervention under an absolute right, or under a discretionary right in an in rem proceeding, need not be supported by grounds of jurisdiction independent of those supporting the original action. Intervention in an in personam action under a discretionary right must be supported by independent grounds of jurisdiction, except when the action is a class action, or when a federal statute gives the conditional right to intervene." 3B Moore, *supra* ¶ 24.18[3] at 24-772 (footnotes omitted).⁶

Research has disclosed neither precedent in the Supreme Court nor in our Court of Appeals for the view that a permissive intervention, in an action which is not in rem, can never be allowed in the absence of an independent federal jurisdictional basis. Given the broad view of the Supreme Court in *Local Loan Co. v. Hunt*, *supra*, and in the light of the expanded doctrine

⁶ (footnote continued) intervention under the Federal Rules of Civil Procedure. See *Walmac Co. v. Isaacs*, 220 F.2d 108, 113-114 (1 Cir. 1955); *Casters v. Watson*, 132 F.2d 614, 615 (7 Cir. 1942), cert. denied, 319 U.S. 757, 63 S.Ct. 1176, 87 L.Ed. 1709 (1943).

⁶ Moore says there that "[t]he majority of recent cases continue to follow the principle that where the right to intervene in in personam actions is discretionary, independent jurisdictional grounds must be shown. However, there are several cases which have taken a broader view and have not required independent jurisdiction." 3B Moore, *supra*, at 24-781. A number of the cases cited by Professor Moore as authority for his text, in turn, cite his text as their authority.

of pendent jurisdiction, *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), I see no bar to following the old equity practice of supporting federal jurisdiction on the basis of the main action where the intervenor is vitally related to it. Furthermore, although this is not a "class action," the reasons of policy which permit an exception in such cases also apply here. The City Commission seeks to represent an aggregate of persons. So does the Attorney General of the United States. Indeed, they are the same persons, the black and Puerto Rican inhabitants of metropolitan New York. It is hardly a large step, in federal question actions, to extend the doctrine of pendent jurisdiction to pendent parties (who really represent a class), even though the additional "claim" is not independently susceptible to federal adjudication. See Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 Harv.L.Rev. 657, 662-64 (1968); cf. *Borror v. Sharon Steel Co.*, 327 F.2d 165, 172-174 (3 Cir. 1964). Such a permissive intervention enhances the efficacy of the federal decree. It does not burden the federal courts unduly, for its operation is permissive and may be easily restricted. It does not lend itself to a possible collusion to confer federal jurisdiction which could exist in diversity cases, because federal question jurisdiction cannot so easily be manufactured.⁷

⁷ Fear of a collusive bestowal of jurisdiction has played a role in a number of prior holdings. Accordingly, some courts have looked at whether the intervenor was a dispensable or an indispensable party. In *diversity* cases, the absence of independent federal jurisdiction has not defeated permissive intervention where the party was dispensable. E.g., *Northeast Clackamas County Electric Co-Operative, Inc. v. Continental Cas. Co.*, 221 F.2d 329, 331-333 (9 Cir. 1955), relying on *Wichita R.R. & Light Co. v. Public Utilities Comm'n.* 260 U.S. 48, 54, 43 S.Ct. 51, 53, 67 L.Ed. 124 (1922) ("Jurisdiction once acquired on that [diversity] ground is not divested by a subsequent change in the citizenship of the parties").

Other courts suggest that while permissive intervention in a diversity case does require an independent diversity of citizenship, permissive intervention requires no independent jurisdictional basis where the original jurisdiction is based on a *federal question*. E.g. *De Korwin v. First Nat. Bank* 94 F.Supp. 577, 579 (N.D.Ill.1950) (semble); see *Olivieri v. Adams*, 280 F.Supp. 428, 432 (E.D.Pa. 1968 (three-judge court)

[10] While it is true that the City Commission could simply wait for the decision of this Court and abide by its terms, there is no assurance that it would wait, and the intervenor's complaint comes within the ancillary jurisdiction of this Court. Intervention would insure that there will be no conflicting order by the City outstanding when the federal case is ended. Cf. *Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 893 (2 Cir. 1971). It will make for uniformity in defining the rights of residents of the City, in which the City has a vital interest, both as a concurrent enforcer of those rights and as a contracting party whose financial interests are involved.

Permission for the City of New York to intervene as an additional party plaintiff in that part of the action which relates to Local 28 is granted. See *Nuesse v. Camp*, *supra*; *Mitchell v. Singstad*, 23 F.R.D. 62, 64 (D.Md.1959). The caption shall be amended accordingly. Papers may be filed without further order.

It is so ordered.

UNITED STATES of America,
Plaintiff,

v.

LOCAL 638 et al.,
Defendants.

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 28,
Third-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Third-Party Defendant.

SHEET METAL WORKERS (LOCAL UNION NO. 28)
JOINT APPRENTICESHIP COMMITTEE AND TRUST,
Fourth-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Fourth-Party Defendant.

No. 71 Civ. 2877.

United States District Court,
S.D. New York.
Jan. 3, 1972.

Action by United States under Civil Rights Act against plumbers union local which allegedly discriminated against minority. The District Court, Bonsal, J., held that where Government demonstrated probability of ultimate success on merits, that harm that would occur if preliminary injunction was not issued far outweighed harm to union from injunction and that granting of relief was in public interest, Government was entitled to preliminary injunction requiring certain minority workers to be granted journeyman status in building and construction trades branch of local.

Order accordingly.

Whitney North Seymour, Jr., U.S. Atty., S.D.N.Y., by Joel Harris, and Steven J. Glassman, Asst. U.S. Attys., for the United States.

Peter Kaiser, New York City, for defendant Local 638.

Breed, Abbott & Morgan, New York City, for defendant Mechanical Contractors Association of New York by Edward Shaw, New York City, of counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BONSAL, District Judge.

FINDINGS OF FACT

I. Background

1. Local 638 is a labor union whose territorial jurisdiction consists of the 5 boroughs of the City of New York and Nassau and Suffolk counties (Tr. 16; Gov't Ex. 1-p. 5).

2. Local 638 is a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry (Tr. 23).

3. Local 638 has two branches—a construction or A branch whose members do mainly construction work and a metal trades or B branch whose members work in shops and do repair work (Tr. 15-16; Gov't Ex. 1-pp. 4-5).

4. At the present time, there are approximately 3850 journeymen members of the A branch, of whom 31 are non-white (Tr. 16), and 2800-3000 members of the B branch, of whom approximately 500 are non-white (Tr. 16; Gov't Ex. 1-pp. 5, 8).

5. There were no non-white journeymen members of the A branch until 1967 (Gov't Ex. 15-3A(3) and (4)).

6. In the past, Local 638 has discriminated against minority workmen in admitting members to the A branch.

7. Members of the A branch have a higher hourly rate of pay than members of the B branch (Tr. 20).

8. Local 638 has 15 officers and eleven business agents, all of whom are white (Tr. 17; Gov't Ex. 1-p. 8).

9. The Mechanical Contractors Association of New York, Inc. ("MCA") is a trade association of heating, ventilating and air conditioning contractors in the New York area (Tr. 58).

10. MCA has approximately 60 members who employ members of Local 638. (Tr. 59).

II. Membership Requirements

11. The only operative requirements for membership in the A branch are that each applicant must have at least 5 years of practical working experience in the plumbing and pipe fitting industry and must be of good moral character. (Gov't Ex. 2-sec. 158, 162).

12. Procedurally, applicants to the A branch send letters to the union stating their qualifications, which letters are reviewed by a committee composed of three of the Union's officers (Gov't Ex. 1-p. 13). These applications are kept on file (Tr. 22) and when additional members are needed in the union—a determination which is based upon the demand for labor (Tr. 21)—applicants are called down, interviewed and, if they have the necessary qualifications, accepted (Tr. 20-1).

13. The union's application process is designed to keep the union membership from being flooded (Tr. 487), by admission of only a small number of new members; this ensures the existence of a shortage of A men and tends to give them job security and high wages.

III. Advantages of A Branch Membership

14. Being a member of the A branch is a substantial aid in obtaining a job as a construction steamfitter in the territorial jurisdiction of Local 638 (Tr. 141; 235; 283).

15. Being a member of the A branch is a prerequisite to obtaining job security and preventing early lay-offs. (Tr. 101, 109, 235, 251, 270, 283, 302).

16. Another advantage of A branch membership is the greater opportunity for advancement (Tr. 128-30).

17. A fourth advantage of A branch membership is the greater opportunity to earn overtime pay (Tr. 270; 501-2).

IV. Shortage of Men in A Branch

18. In the post-war era, there has been a shortage of construction steamfitters in the New York area (Tr. 152, 171-2, 182, 197-9, 357, 464, 528) as well as a shortage of welders (Tr. 152, 172).

19. As a result of said shortage of manpower, the employers have been required to expend substantial monies for overtime (Tr. 153, 172, 468).

20. In addition, the union has referred B men to work as construction steamfitters in its jurisdiction (Gov't Ex. 1-pp. 27-8, 35).

21. At present there are at least 75 minority members of the B branch and approximately 100 minority non-union men who are working as construction steamfitters in the jurisdiction of Local 638 (Tr. 75-8; Gov't Ex. 7,8).

22. The minority workmen presently employed as construction steamfitters receive A scale wages. (Gov't Ex. 1-p.11).

V. Minority Workmen and Their Qualifications

23. The Joint Apprenticeship Program of the Workers Defense League ("WDL") is a non-profit organization funded by the U.S. Department of Labor whose purpose is to recruit and place minority construction workers (Tr. 212).

24. Last summer the WDL, which is the recognized authority for profession recruitment of minorities in the construction business (Tr. 70-1) recruited one hundred minority workmen who were placed in jobs as construction steamfitters by members of the MCA (Tr. 70).

25. Representatives of the employers reviewed the background of these men (Tr. 71-2), all of whom had at least five years experience in the pipefitting industry. (Tr. 83-4)

26. These minority workmen were tested by the recognized testing authorities to determine who could weld (Tr. 72-3) and, although these men were not given the normal cram course (Tr. 75), 25 men were certified and another 25 scored high on the test (Tr. 73).

27. The fifty workmen who scored well on the test were given welding jobs and the other men were employed as steamfitters by members of MCA (Tr. 73-4).

28. The minority workmen (B branch members and non-union) who are presently employed as construction steamfitters are doing the same kind of work as members of the A branch on their respective job sites (Tr. 100, 125, 139, 154, 235, 269, 281, 301).

29. Many of said minority workmen have far more than 5 years experience in the pipefitting industry (Tr. 83, 99, 107, 121, 137, 231, 248, 298, 499).

30. The employers find these 169 minority workmen on the whole to be as competent as A men (Tr. 154, 156-7, 172, 194, 207) and wish to keep them on (Tr. 13).

VI. Union Membership for Minorities

31. The 169 minority workmen desire to join the A branch of Local 638 (Tr. 101, 109, 128, 141, 234, 251, 283, 302).

32. A number of the minority workmen have applied for membership in the A branch (Tr. 102, 130-1, 141-2, 270-1, 302-3; Gov't Ex. 10, 12, 13) but none have become members (Tr. 101, 128-132, 140-1, 270-1, 302).

33. Others have not applied for A branch membership because they believed such an application would be useless (Tr. 109, 235).

34. All of the minority workmen meet the requirements to become members of the A branch.

35. The union's denial of membership in the A branch to these 169 minority workmen constitutes a discrimination based upon race and national origin.

CONCLUSION OF LAW

1. Local 638 is a labor organization within the meaning of 42 U.S.C. § 2000e(d) and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. § 2000(e).

2. The Court has jurisdiction over this action by virtue of 42 U.S.C. § 2000e et seq. The Attorney General is authorized under the Civil Rights Act of 1964 to institute suit to enjoin a pattern or practice of discrimination and request such relief as may be necessary to insure the full enjoyment of rights described in Title VII. 42 U.S.C. § 2000e-6(a).

[1] 3. The government has established a *prima facie* case that defendant Local 638 has pursued a pattern and practice of conduct with respect to employment opportunities in the construction industry which has denied minorities the same opportunities available to whites. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *United States v. Dillon Supply Company*, 429 F.2d 800 (4th Cir. 1970); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S. Ct. 926, 25 L.Ed.2d 108 (1970); *United States v. Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969); *United States v. Mitchell v. Hayes International Corporation*, 415 F.2d 1038 (5th Cir. 1969); *Rios v. Enterprise Ass'n Steamfitters Local U #638 of U.A. et al.*, 326 F.Supp. 198 (S.D.N.Y.1971).

[2] 4. The defendant Local 638's membership policies, which the Government has established as having the effect of perpetuating past discrimination, are unlawful. See *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Jones v. Lee Way Motor Freight, Inc.*, *supra*; *United States v. I.B.E.W. Local No. 38*, 428 F.2d 144 (6th Cir. 1970) cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *Local 189, United*

Papermakers and Paperworkers v. United States, supra; United States v. Sheet Metal Workers, Local 36, supra; Local 53, Int'l Ass'n of Heat & Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D.Va.1968).

[3] 5. The government has shown probability of ultimate success on the merits, that the harm which will occur if the preliminary injunction is not issued far outweighs the harm to the union and the fact that the granting of relief herein is in the public interest. Hence, the government is entitled to preliminary relief in this case. See cases cited in the Government's Memorandum of Law submitted in support of this motion, dated November 9, 1971.

ORDER

Plaintiff, the United States of America, having moved by Order To Show Cause dated November 9, 1971 for the issuance of a preliminary injunction enjoining defendant Local 638, Enterprise Association, etc. ("Local 638") from denying to qualified minority workmen union membership on terms and conditions, and with rights, privileges and responsibilities equal to all other workmen enjoying journeyman status in the Building and Construction Trades Branch of Local 638, without regard to race or national origin, and the Court having heard testimony at hearings commencing on November 26, 1971, and having read and filed the affidavits and exhibits submitted in support of said motion and in opposition thereto; and after due deliberation and after rendering and filing Findings of Fact and Conclusions of Law, it is hereby

Ordered, that the 169 minority workers whose names are set forth on Exhibit A, are hereby granted full journeyman status in the Building and Construction Trades Branch, ("A Branch") of Local 638, with rights, privileges and responsibilities equal to those of all other members enjoying full journeyman status, these rights and privileges to include the services provided by Local 638 in assisting members of the A Branch in obtaining and retaining employment with steamfitting industry employers in New York City and Long Island; and it is further

Ordered, that Local 638 shall, within one week of the date of this Order, inform each of the minority workers whose name is set forth on Exhibit A, in writing, of his A Branch status as hereinabove set forth and of the provisions for payment of the initiation or transfer fee and dues, and of the amounts and dates such payments are due, as hereinafter set forth; and it is further

Ordered, that the initiation or transfer fees payable by the said minority workers shall be those charged other members of the A Branch similarly situated and presently in force, and shall be payable at the union office, 841 Broadway, New York City, in equal weekly installments over a period of 10 weeks commencing two weeks from the date of this Order, for which receipts will be given by Local 638; and it is further

Ordered, that, as of the date of this Order, said minority workers shall be liable to pay the union dues charged to other members of the A Branch similarly situated and presently in force, on the same basis as union dues paid by other members of the A Branch, such payment to commence two weeks from the date of this Order, for which receipts will be given by Local 638 until the formal issuance of the appropriate A-Branch Union Book; and it is further

Ordered, that within 45 days of the date of this Order, or immediately upon payment in full of the aforesaid initiation or transfer fee, whichever shall later occur, Local 638 shall issue or cause to be issued formal membership documentation, including the appropriate A-Branch Union Book, to each of the said minority workers as is issued to all other journeymen members of said A Branch; and it is further

Ordered, that within 30 days of the date of this Order, Local 638 shall have the right, if it deems any of said minority workers to be incompetent, to apply to this court for an Order striking the name of such allegedly incompetent minority workers from Exhibit A, such application being independent of but not in lieu of the preceding paragraphs of this Order; and it is further

Ordered, that within 60 days of the date of this Order, Local 638 shall submit to the Court proposed objective qualifications and procedures, including a description of any practical and

written examination(s), for admission of workers, regardless of race or national origin, to full journeyman status in the A Branch which procedures shall take effect upon approval by the Court, and shall be applied to all applicants to the A Branch during the pendency of this action; and is further

Ordered, that the Court retains jurisdiction for the purpose of effectuating this decree.

STATE COMMISSION FOR HUMAN RIGHTS v. FARRELL

Cite as 252 N.Y.S.2d 649

43 Misc.2d 958

Application of STATE COMMISSION FOR HUMAN RIGHTS, Petitioner, v. Mell FARRELL, individually and as president of Local Union No. 28 of Sheet Metal Workers' International Association of Greater New York, an unincorporated association, Joint Apprenticeship Committee, representing the Employers' Association in the Sheet Metal Industry in New York City and said Local Union No. 28, John Mulhearn, Howard Bretz, John Dasch, Michael J. Minieri, Nathaniel Gold, Morris Lipka, Seymour Zwerling, Richard Funk, and Thomas A. Mitchell, Respondents, to obtain a Court Order, pursuant to Section 298 of the Executive Law, for the enforcement of an order dated March 20, 1964, made by petitioner against respondents.

Supreme Court, Special Term, New York County, Part I.

Aug. 24, 1964.

Supplemental Opinions Nov. 6 and 24, 1964.

Proceeding by State Commission on Human Rights for enforcement of order affecting employment practices in sheet metal industry and finding that union, local union, and joint apprenticeship committee denied to or withheld from qualified Negroes and other minority groups right to be admitted to and participate in sheet metal apprentice program solely because of race and color. The Supreme Court, New York County, Special Term, Part I, Jacob Markowitz, J., held that final plan generally providing for selection of apprentices in sheet metal trade without regard to race, creed, color, national origin, or physical or psychological handicaps provided the physical or psychological handicaps would not interfere with ability to perform and for selection of apprentices on basis of qualifications alone, right to appeal and reapply, and appointment solely and exclusively on basis of point score obtained on aptitude test and interview was acceptable as nondiscriminatory, and that

evidence failed to support findings that individuals themselves who acted on joint apprenticeship committee had denied to or withheld from qualified Negroes and other minority groups the right to be admitted to and participate in the program solely because of race and color.

Findings and affirmative provisions of order adopted except as to findings against individuals themselves as to their prior conduct and past acts and as to cease and desist order.

• • •

Henry Spitz, New York City (Sidney Kant, William M. Miles, Solomon J. Heifetz, New York City, of counsel), for NYS Commission for Human Rights.

Cohn & Glickstein, New York City (Sidney E. Cohn and Samuel Harris Cohen, New York City, of counsel), for respondent Local 28, Union Officers and Representatives.

Zelby & Burstein, New York City (Herbert Burstein, New York City, of counsel), for respondent Zwerling.

Breed, Abbott & Morgan, New York City (Thomas A. Shaw, Jr., New York City, of counsel), for respondents Funk & Mitchell.

Stember & Dershowitz, New York City (Jerome M. Stember, New York City, of counsel), for respondent Lipka.

David Harrison Storper, New York City, for respondent Gold.

Louis J. Lefkowitz, Att. Gen., New York City (Shirley A. Siegel and George D. Zuckerman, New York City, of counsel), for the State.

Martin P. Catherwood, Industrial Commissioner (Benjamin Rosenthal, Brooklyn, of counsel), for Joint Apprenticeship Committee, respondent.

JACOB MARKOWITZ, Justice.

Motions numbered 39, 40, 42, 43, and 62 of June 22, 1964, are consolidated with motion Number 41 of the same date.

Pursuant to Section 298 of the Executive Law, the State Commission for Human Rights has brought this proceeding seeking enforcement of its order affecting employment practices¹ in the sheet metal industry. The order of the Commission, in essence, found that the respondent union, Local 28 of the Sheet Metal Workers International Association of Greater New York (hereinafter referred to as "Local 28"), and the Joint Apprenticeship Committee² (hereinafter referred to as "JAC") denied to or withheld from qualified Negroes and other minority groups the right to be admitted to and participate in the Sheet Metal Apprentice Program under their control solely because of

¹ Proceedings herein were commenced by complaint of the Attorney General of the State of New York to the Commission, pursuant to Section 297 of the Executive Law of the State of New York. The complaint charged violation of Section 296, subd. 1(b), 296, subd. 1-a and 296, subd. 6, which provide:

"Sec. 296. Unlawful discriminatory practices.

"1. It shall be an unlawful discriminatory practice: • • •

"(b) For a labor organization, because of the age, race, creed, color or national origin of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

"1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs: • • •

"(b) To deny to or withhold from any person because of his race, creed, color or national origin the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, or other occupational training or retraining program:

"(c) To discriminate against any person in his pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color or national origin. • • •

"6. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so."

The order of the Commission was issued in conformity with Section 297.

² The Joint Apprenticeship Committee, containing equal union and employer representation, was created by the parties to supervise and control all duly qualified apprentices. It is required under the Standard Form of Union Agreement, the collective bargaining agreement governing the industry, to formulate and make operative rules to govern the conditions pertaining to duly qualified apprentices and the operation of an adequate apprentice training system.

race and color. The order further found that the individual respondents herein, who are employer members of the JAC, aided and abetted the other respondents in denying qualified Negroes the right to enroll in the apprenticeship program. By separate motions, Local 28 is seeking review of said order, and the individual respondents seek to set aside said order as it affects them individually.

The Commission found that Local 28, consisting of 3300 members and 430 apprentices, has never had nor does it presently have a Negro member, nor has any Negro participated in the JAC training program. The only realistic way of becoming a member of Local 28 is through the JAC program. The Commission further found that, in the most recently completed training program, 80 per cent of the trainees were related in some manner to the members of Local 28. The Commission also found that admission to the apprenticeship training program was not based upon any set of objective standards. No provision existed safeguarding any applicant against discrimination because of race, color, creed, or national origin. Nor was there any provision entitling an applicant to seek review of a rejection of his application for training.

[1] The court concludes that the findings of the Commission, except as hereinafter noted, are supported by substantial evidence on the record considered as a whole. The findings are therefore conclusive (Executive Law, § 298; *Holland v. Edwards*, 307 N.Y. 38, 44, 45, 119 N.E.2d 581, 583, 584, 44 A.L.R.2d 1130; *Stork Restaurant v. Boland*, 282 N.Y. 256, 274, 26 N.E.2d 247, 255). The enforcement procedures set forth in the Commission's order thus are the remaining issue for consideration.

The Court approaches this matter not simply as litigation between private parties, but rather views the instant proceedings as raising vital matters filled with greatest public concern. The issue herein, involving the development of non-discriminatory shop training programs, cannot be approached strictly within the conventional confines of an adversary proceeding. The people of this State, as well as groups throughout the country, are searching for guide lines in the handling of this volatile problem. To that end, the court enlisted the cooperation of the parties.

The Court arranged conferences with all parties and governmental agencies concerned, in the hope that the desirable objectives might be achieved by conciliation and agreement rather than solely by force of law.^{2a} Numerous and extended conferences were held throughout the summer in an attempt to achieve the adoption of acceptable standards for an apprentice training program which would carry out the spirit and the intent of the Law Against Discrimination (Article 15 of the Executive Law) and the principles of equality which are fundamental to both our federal and state Constitutions and systems of law. Represented and participating at the conferences were the Commission, the employers, the union officials involved, the Industrial Commissioner, and the Attorney-General. From time to time each of the parties requested a conference with the Court, jointly or severally, while the standards for the joint apprenticeship program consonant with the Court's directions were being formulated.

From the inception of these proceedings and conferences, the Court advised the parties that it could not recognize any plan as acceptable unless it truly afforded every applicant for admission to the apprenticeship program equal opportunity, nor would any plan be approved that did not abolish the existing practice of favoritism because of family affiliation, or did not provide for a complete and fair review procedure, or made it economically difficult for an applicant to qualify, or incorporated unreasonable educational requirements, or which in any other way would prevent equal opportunity under objective standards or selection on any basis other than the basis of qualification alone.

^{2a} This is in keeping with the spirit of the law against discrimination, which, rather than providing for the usual procedures for review of administrative agency determinations (See, CPLR Article 78), has incorporated provisions giving the Supreme Court complete jurisdiction of the proceeding and the power to grant such temporary or permanent relief as it deems just and proper (see, *Right To Equal Treatment: Administrative Enforcement of Anti-discrimination Legislation*, 74 Harvard Law Review, 526 et seq.).

The Court recognized that the issue before it involved the foundations of our democracy. Judicial decisions,³ legislative enactments,⁴ and events in the world outside the courtroom demonstrate that today's crucial testing ground for the American system of democracy is in the area of equal rights for its Negro citizens. Equality for our minority groups—the right to equal job opportunity, the right to equal educational opportunities, the right to equal housing opportunities, and the right to vote—is the essence of democracy today. Without it our democracy falls short of securing fundamental human rights for all citizens. Unless every citizen enjoys all the rights of freedom, our democracy becomes anemic. Anemic democracy is nonexistent democracy. There must be a moral awareness and a greater concern for human rights and dignity and the dignity of man. Industry, labor, government at all levels, and the public-at-large, must embrace this basic concept.

The legal profession has recognized the urgency of achieving racial equality in conformity with law and order.⁵ As President

³ See, e. g. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (state imposed segregated public schools); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (racial restrictive covenants); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (restaurant); *State Athletic Commission v. Dorsey*, 359 U.S. 533, 79 S.Ct. 1137, 3 L.Ed.2d 1028 (athletic contests); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (political organization primary); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (geographic redistricting of municipal voting areas); *Johnson v. State of Virginia*, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195 (state compelled segregation in courtroom); *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (discrimination in violation of Railway Labor Act).

⁴ Civil Rights Act of 1964, U.S.P.L. 88-352, 78 U.S.Stat. 241 et seq. N.Y.Laws 1964, Chap. 948, amending the Executive Law and the Labor Law, see *infra*. U.S. Public Law, 88-452 of the 88th Congress, 78 Stat. 508 ["anti-poverty law"—August 1964].

⁵ "The thrust for implementation of Negroes' rights to jobs, education and housing remains the most urgent domestic issue of 1964. It was dramatized in the summer of 1963 by the 'March on Washington', and the summer of 1964 promises to produce a variety of civil rights activity, both in the South and in the North.

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Johnson has recently said, "The denial of rights invites increased

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"The New York State Bar Association considers this a strategic time to express some basic principles for guidance of lawyers and other citizens in meeting the problem. All our human and property rights depend on a system of laws which are to be obeyed. Flaunting any law weakens the grounds of all those rights. New York State has been a pioneer in legal protection of the rights of minorities. There are correlative obligations; on the community, to assure the achievement of racial equality in conformity with law, and on minority groups to conform with law and order in voicing their demands for effective equality. "The first basic principle is that the achievement of racial equality requires the urgent efforts of the entire community. One hundred years after the Emancipation Proclamation, and ten years after the school segregation decision, there are still many areas of our life where patterns of segregation remain. Anti-bias housing laws still fall short of permitting the dispersal of minority groups from segregated areas in both urban and suburban communities. Steps to provide true equality of educational opportunity are proceeding slowly, and will require vast sums of money, which may necessitate additional taxes on all our citizens. The opening of new employment opportunities for Negroes has proceeded slowly. There is need for much wider channels of communication, so that the community may be fully aware of minorities' problems, and the minorities may be kept informed of the efforts which are being made to implement their rights.

"The second basic principle is that demands for racial equality should be expressed in conformity with law and order. Camping in government or business offices, blocking traffic, or like wilful obstructions, are tactics which we believe both bespeak and beget disrespect for law—a disrespect which is singularly antithetical to the goal of equal rights for all. Such tactics are unnecessary in New York State, where the law imposes virtually no obstacles to peaceful protest against social evils, the courts act impartially, the ballot is open equally to all, and public officials are available to all persons asserting grievances. Moreover, demonstrations which interfere with the civil rights of others are not, we suggest, the best way to achieve equality of treatment. Ideally, the common resolve to promote racial justice should not be prejudiced by any misconduct of civil rights advocates. It is a fact of life that demonstrations which violate the rights of others frequently lose friends and alienate the support of many persons of good will. Frustrations caused by delay in reaching full equality do not justify resort to violence or lawbreaking.

"The third basic principle is that lawyers should lead in assuring the legal rights of all citizens. They are equipped by training, experience and skill to resolve disputes on a basis of reasonable adjustment, rather than emotion and violence, but they must undertake more active roles both individually and in association than heretofore. We commend the efforts of the Lawyers' Committee for Civil

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disorder and violence and those who would hold back progress toward equality and at the same time promise racial peace are deluding themselves and deluding the people. Orderly progress, exact enforcement of the law are the only paths to an end of racial strife." (Address to the American Bar Association, August 12, 1964.)

There is perhaps no right more important for the achievement of equality than the right to learn how to perform a job. The Court of Appeals has recently noted that discrimination in employment, with its consequent economic disparities upon which other kinds of discrimination thrive, is the "main key" to the problem of ending discrimination based on race and creed. *Board of Higher Education of the City of New York v. Carter*, 14 N.Y.2d 138, 250 N.Y.S.2d 33, 199 N.E.2d 141.⁶ Denial of the right to be trained in many industries is tantamount to denial of employment. Discrimination based upon race which effectively excludes a minority from the right to be employed in a particular industry has been condemned by the courts. See e. g. *Kelly v. Simons*, Sup., 87 N.Y.S.2d 767, 770; *James v. Marinship Corp.*, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900 (1944); *Todd v. Joint*

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Rights Under Law, to resolve the nation's racial problems, and we urge all local bar associations to study what needs to be done in their own areas, and to furnish leadership in accomplishing it. The Lawyers' Committee urges local bar aid in two particular fields—establishing bi-racial committees to seek solutions to civil rights problems, and seeing that all persons in civil rights controversies can obtain competent legal counsel. When a citizen takes the law into his own hands by wilfully violating it, the result is nothing less than anarchy and must never be condoned by an emotional misjudgment that the end justifies the means. Resentment of illegal demonstrations should not be an excuse for relaxing the efforts of the white community to promote racial justice. Local bar associations can help clarify fundamental legal issues as a contribution to public discourse."

Statement unanimously adopted by the Executive Committee of the New York State Bar Association, June 13, 1964.

⁶ One of the foremost leaders in the Negro movement for equality has stated that the struggle for rights is ultimately the "struggle for opportunities" and that the Negro does not want to be told that there is no place where he can be trained to handle a job. Martin Luther King, Jr., "Why We Can't Wait", (Harper & Row, 1963) p. 149.

Apprenticeship Committee, D.C., 223 F.Supp. 12, rev'd on other grds., 332 F.2d 243 (7th Cir. 1964); compare *Gaynor v. Rockefeller*, 21 A.D.2d 92 at p. 100, 248 N.Y.S.2d 792 at pp. 802-803.

[2] Independent of judicial precedent, this court enunciates the principle that it will not countenance discrimination in job training programs which exclude the victimized minority from employment in industry. As noted above, consideration of the issue herein must realistically acknowledge the keystone position of equality in job opportunity (and as a prerequisite thereof equality in job training and apprenticeship opportunities)⁷ for achievement of full equality required in our democracy. The best schooling in the world can lead only to frustration if it does not lead to a decent job; equal access to the best restaurants or residential areas is meaningless if there is no money to pay the going price; full right to participate in public life is small comfort if one's private life is impoverished.

The court notes that the history of the American labor movement reveals a continuing concern by its major branches and spokesmen for the achieving of equality for all.⁸ The concern of American labor for equality has increased with the passing

⁷ In 1959 unemployment averages for whites were at a level of 4.6% while for non-whites the averages were as high as 11.5%. This disparity in unemployment rates has been attributed to the inadequate participation of Negroes in apprenticeship training. *The Economic Situation for Negroes in the United States, 1960 Report by U.S. Dept. of Labor*.—25% of the male Negro teenagers who are in the labor force are unemployed. [Unpublished Gov't statistics Aug. 22, 1964]

⁸ a. As early as 1866, at the convention of the National Labor Congress, it was said that if the union " * * * be misled by prejudice or passion as to refuse to aid the spread of union principles among our fellow toilers, we would be untrue to them—to ourselves * * * If these general principles be correct, we must seek cooperation of the African race in America." A.C. Cameron, "The Address of The National Labor Congress to the Workingmen of the United States." (Reprinted in Commons, et al., *Documentary History of American Society*, Vol. 9, pp. 141-168.)

b. One year later, Uriah Stephens, of the Knights of Labor, the forerunner of the American Federation of Labor, declared that he could see ahead of him "an organization * * * that will include men and women of every craft, creed and color." Commons, et al., Vol. 2, p. 167.

years. Particularly relevant to the instant case has been the attention that the labor movement has given to the problem of discrimination in apprenticeship programs. George Meany, President of the AFL-CIO, declared before a Special Subcommittee of the House Committee on Education and Labor in 1961;⁹

"What we need in this country is genuine equality of opportunity for all citizens regardless of race, creed, color or national origin. Let's grant that apprenticeships are a problem; fine, let's act on that problem. But apprenticeship is only a part of a much broader problem."¹⁰

In June of 1963,¹¹ the General Presidents of the unions affiliated with the Building and Construction Trades Department, AFL-CIO, adopted a program which included the following provision:

"4. With regard to the application for, or employment of apprentices, local unions shall accept and refer such applicants in accordance with their qualifications and there shall be no discrimination as to race, creed, color or national origin, * * *"

⁹ U.S. Congress House Committee on Education and Labor, Equal Opportunity in Apprenticeship Program Hearing, 87th Cong., 1st Sess., (August, 1961) on H.R. 8219.

¹⁰ The model union pledge, signed in 1962 by 116 national unions and 300 directly chartered labor unions, representing about 11 million workers, declares in unambiguous terms:

"We shall seek agreement from management to write into joint apprenticeship training programs in which we participate a non-discrimination clause in regard to admission and conditions of employment of apprentices and shall see that this clause is administered in such a way as to give full and effective application of non-discrimination throughout all such training."

¹¹ Press Release of the Building and Construction Trades Dept., AFL-CIO, June 21, 1963, p. 2.

Nevertheless, discrimination does exist.¹² It is with the effective and wise eradication of the manifestations of unwarranted prejudice in the apprenticeship program in the Sheet Metal Industry in the City of New York that this Court is concerned in the instant proceeding.

[3] With respect to the plan proposed, Local 28 made a forceful presentation in favor of attaching some preference to those applicants who are sons or sons-in-law of present or deceased members of the Union. The Court recognizes that the practice of giving some preference to applicants with filial ties to Union members is widespread and dates back to the very inception of craft unions when craftsmen first joined together in guilds. The historic, economic and social reasons for the practice of filial preference and its beneficial effects have been urged by the Union and examined by the Court.

Under the realities of today's society, the guarantee of equal protection of the laws and the prohibition against discrimination contained in Section 11 of Article I of the New York Constitution requires that this Court refuse to sanction any plan which could be used, directly or indirectly, to discriminate against any person on the basis of race, color, creed or national origin. The 1964 Amendments to the Executive Law and Labor Law apply this principle directly to the area before the court—apprenticeship training programs. The court concludes that provision in this apprenticeship training program for preference or credit because of filial relation would be illegal and unconstitutional and so advised the parties and the Industrial Commissioner.

¹² a. Woll, "Labor Looks at Equal Rights in Employment" 24 Fed. Bar Journal, No. 1 page 93 (Winter 1964).

b. Barkin, The Decline of the Labor Movement, 50-51 (1961).

c. President Meany has noted: "It would be futile to pretend that the 13½ million members of the AFL-CIO unions are without exception devoted to the cause of civil rights. They are a cross-section of America, and they reflect the diversity of the nation. But just as truly they reflect the American consensus. That consensus, expressed by AFL-CIO conventions and by conventions of the affiliated national and international unions, is the basis for the AFL-CIO's determination to abolish all forms of discrimination." "Equal Rights for All", p. 4 (AFL-CIO) Publication No. 133.

In addition to the over-riding constitutional and legislative declarations of equality, the court believes that filial preference is contrary to modern day societal objectives concerning job qualifications. No lawyer or doctor today would expect his son to receive preference by reason of family relationship in applying for admission to the Bar or for a medical license. Admission to a profession or industry based exclusively upon the applicant's qualifications to perform in the profession or industry as determined by objective criteria is to be encouraged.

The court was also concerned that the original proposed plan did not provide for adequate review procedures to an applicant, and directed appropriate amendments.

In the fourth completed draft, the parties submitted a new plan whereby an applicant, after he has exhausted his right to review before the JAC, may obtain further review by a member of a panel chosen by the Presiding Justice of the Appellate Division of the First Department. After consultation, the Presiding Justice graciously consented to perform this function.

The court was also concerned with the fact that educational standards higher than were reasonably necessary might be adopted. To this end, the court suggested a graduated system which would be fair to minority groups and at the same time discourage high school drop-outs, while nevertheless meeting the minimum scholastic requirements for an apprenticeship trainee. Under the court's suggestion, an apprenticeship trainee for the 1965-66 programs would be required to have completed two years of high school work or its equivalent; for the 1967-68 programs, a three-year requirement or its equivalent would be necessary, and thereafter a completed high school course or its equivalent would be mandatory. The plan as finally adopted is sufficiently flexible to meet these suggestions, and if need be will be supplemented in the final order of the court.

The question of applicant fees was also considered. In order to avert an economic barrier, it was urged by the court that such fees be kept to a minimum or even eliminated. However, it is recognized that administrative and medical examination costs might make it necessary to require an apprenticeship applicant

to defray some of the expenses. Accordingly, the accepted plan adopted a provision whereby such cost would never exceed the amount of \$10.

The problem pertaining to the 430 individuals on the present apprenticeship list was resolved by providing that they and all other applicants shall be accorded equal treatment in determining their eligibility to be appointed to the apprenticeship training program and be judged by the same set of objective standards. Further, it is provided that no preferential treatment shall be given to either those who apply for admission *de novo* or those who have applied heretofore.

[4] Another question which remained before the court is whether the individual respondents acted as individuals or solely in their representative capacities. This is important in view of the possible sanctions. Were it not for the complete cooperation given by all of the individuals to the establishment of a non-discriminatory joint apprenticeship training program, the Court might well have found that the record was susceptible of sustaining the finding holding the individuals responsible in their individual capacities as well as in their representative capacities. The court, however, is not unaware of the private economic and social forces that operate to compel individuals to follow the course of least resistance, frequently on the theory that it is only committee responsibility and not individual responsibility which they assume. In a situation such as the present one, none of the employer members of the Committee receives compensation for his services, nor do they as individuals benefit from the committee responsibility which they carry out. The court recognizes that industry/union committees are desirable, if not vital, to the harmonious working out of industry-wide labor problems. The court is convinced that the individual respondents are in favor of the underlying theory of equality of opportunity in job training. The court finds that the representatives of industry and labor act both in their individual as well as in their representative capacities. However, under the circumstances of the entire case, the court will not affirm those findings of the Commission against the individuals themselves as to their prior conduct and past acts.

There were other difficulties and problems presented by the original and intermediate plans which need not be gone into in any further detail. The final plan (fourth completed draft) presented by JAC and approved by the Commission is set forth in full in Appendix "A" to this decision.

In addition to the matters heretofore alluded to, the final plan generally provides for the selection of apprentices without regard to race, creed, color, national origin, or physical or psychological handicaps provided the latter two do not interfere with the applicant's ability to perform. Apprentices must be selected on the basis of qualifications alone, and all applicants will be afforded equal opportunity under the adopted standards. A rejected applicant is to be notified and the reasons given therefor with the right to appeal. A rejected applicant may reapply. The age prerequisites are 18 to 23 with some modifications. Medical and physical examinations are required. Aptitude tests are to be given by the New York City Testing Center or equivalent testing center. Two hundred percent of the number of apprentices ultimately to be appointed who have achieved the highest rating in an independently conducted aptitude test will be interviewed. The interviewing board is to consist equally of representatives of labor and industry. The maximum point score one can achieve on the test will be 750, and on the interview 150. Appointments will be made solely and exclusively on the point score. The term of apprenticeship will be four years (approximately 7,000 hours) of reasonably continuous employment, divided into eight periods. On-the-job instruction will be given in specified areas, and trainees will be required to attend formal classes one day every second week with pay. Tuition fees for such instruction are provided for, as well as periodic examinations. The plan annexed hereto also embodies other aspects. Not specifically included in the plan, but agreed to by the parties is a requirement for publicizing the program in the schools and through other channels and media making it clear that it is open to all who are interested and can meet the objective standards. The publicity requirements will be incorporated in the order to be settled hereon. The next apprenticeship class will be in January or February, 1965, and be under the plan adopted herein.

[5] The plan herein adopted was the result of the unusual cooperative spirit on the part of the Commission, industry, union officials, their respective counsel and the Attorney General. The court expresses its appreciation to the aforementioned parties. The court accepts the plan because it is enlightened, progressive and in accordance with the principles of non-discrimination, equality of opportunity and on the basis of qualification alone under objective standards.

It is hopefully expected from the effective implementation of this program a truly non-discriminating union will emerge. A rare opportunity is afforded to this industry to serve as a model for others, and, by rigid adherence to the adopted standards, itself becomes a standard of morality and brotherhood, equal opportunity and democracy.

The objective standards herein adopted for the apprenticeship program in the Sheet Metal Industry of New York City may well be a model for state-wide utilization by the New York State Industrial Commissioner, who is mandated¹³ to promulgate rules and regulations in implementing Chapter 948 of the Laws of 1964.¹⁴ In summary, the Commission's findings and affirmative

¹³ The Industrial Commissioner is granted power to promulgate such rules by Section 811 of the Labor Law.

¹⁴ Amendments to the Executive Law and the Labor Law of New York in relation to equality of opportunity in apprenticeship training will become effective on the 1st of September, 1964. (L.1964, Chap. 948). Section 296 of the Executive Law is amended by adding an express provision that it shall be an unlawful discriminatory practice for any joint labor management committee controlling apprentice training programs:

"(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review."

Subdivision 3 of Section 815 of the Labor Law has been concurrently amended so as to provide that suggested standards for apprenticeship agreements include:

"3. Provision that apprentices shall be selected on the basis of qualifications alone, as determined by objective criteria which permit review, and without any direct or indirect limitation, specification or discrimination as to race, creed, color or national origin."

provisions of its order are adopted except as to finding No. 66 as modified and as to the cease and desist order by striking the second decretal paragraph as heretofore indicated in this opinion.

At the request of the parties, the court is retaining jurisdiction. An interim order including findings consistent with this opinion will be settled hereon.

Supplemental Opinion

Since the decision of this Court, the State Industrial Commissioner has issued "Apprentice Training Regulations" (12 N.Y.C.R.R., c. IX, sub.-ch. A, Part 600), effective September 1, 1964, which in many areas embrace the principles set forth in the original decision and Appendix A annexed thereto.

The parties have accordingly amended Appendix A pertaining to the standards established by the Joint Apprenticeship Committee so as to provide that the Apprentice Training Regulations of the State Labor Department and any amendments thereto are to apply insofar as they are not inconsistent with the decision of the Court and the order signed and entered simultaneously herewith.

In addition, Appendix A has been supplemented so as to reflect additional requirements as enunciated in the original decision, clarify and group the provisions pertaining to notification of acceptance, rejection, appeal and review procedures, and incorporate other appropriate changes.

Footnote continued from previous page

These two legislative amendments along with the enactment of Title 7 (Equal Employment Opportunity) of the Civil Rights Act of 1964 (78 Stat. 241 et seq., Public Law 88-352) which makes it an unlawful employment practice to discriminate on the basis of race in any apprenticeship program, evince the fact that apprentice systems have not heretofore been dedicated to the principle of equality. Both the state and federal legislation is directed to the same end of abolishing discrimination in the apprentice programs.

The selection of the first apprenticeship class under the newly-adopted standards shall take place within a reasonable period of time.

The standards established by the Joint Apprenticeship Committee, dated October 14, 1964, shall replace and supersede, as Appendix A to the decision-in-chief herein, the standards dated August 12, 1964 and are annexed hereto and made part of this decision.

APPENDIX "A"

CORRECTED FIFTH DRAFT

-of-

STANDARDS FOR THE ADMISSION OF APPRENTICES ESTABLISHED BY THE JOINT APPRENTICESHIP COMMITTEE & TRUST FOR THE SHEET METAL INDUSTRY OF NEW YORK CITY, N.Y. PURSUANT TO THE "AGREEMENT" AND DECLARATION OF TRUST AND THE RULES AND REGULATIONS ADOPTED THEREUNDER BY THE TRUSTEES

PART I

PURPOSES, INTENT AND PROCEDURE

A. NON-DISCRIMINATORY PROGRAM—Selection of apprentices will be made subject to the objective standards herein provided. Apprentices will be selected on the basis of qualifications alone, and all applicants will be afforded equal opportunity under these standards without regard to race, creed, color, national origin or physical or psychological handicaps, *provided however*, that if the physical or psychological handicaps

affect the applicant's ability to perform the manual labors required by the trade, the applicant will not be accepted.

FORMS—Applications shall be submitted on a form designated by the Committee which shall incorporate the standards herein set forth.

B. APPLICATIONS—All applicants who heretofore have applied, and all applicants who may hereafter apply for apprenticeship training shall be accorded equality of treatment in determining their eligibility to be appointed to the apprentice training program and shall be judged by the same set of objective standards. No preference in treatment shall be given between those who apply for admission de novo and those who have applied heretofore.

C. REAPPLICATION OF REJECTEES—Applicants who have been rejected may re-apply at any time, so long as they satisfy the age, educational and physical requirements.

PART II

QUALIFICATIONS

A. NOTIFICATION OF REQUIREMENTS—A written statement of the qualifications for admission will be given to each applicant prior to the time when each applicant is first required to demonstrate his qualifications.

B. AGE PREREQUISITE—Applicants for Apprenticeship Training shall:

- (a) be not less than 18 years of age, nor more than 23; but applicants who are 17½ years of age, but less than 18 at date of designation of successful apprenticeship applicants to the program may be considered for apprenticeship from and after the date they reach their 18th birthday. Service in the Armed Forces may extend the age limit to 25 years of age, but in no event shall the age limit be extended for more than the period of time spent in the Armed Forces.

- (b) **HIGH SCHOOL PREREQUISITE**—Applicants who file applications for admission to the Apprenticeship Training Program during the years 1965-1966 shall have completed satisfactorily not less than two years of high school study; and applicants who file applications for admission to the Apprenticeship Training Program during the years 1967-1968 shall have completed satisfactorily not less than three years of high school study; and

Applicants who file applications for admission to the Apprenticeship Training Program during 1969 and thereafter, shall have graduated from high school or have an equivalency certificate showing completion of high school studies.

- (c) **PHYSICAL EMOTIONAL PREREQUISITE**—Be physically fit and emotionally stable for work in the trade. Each applicant who meets the age, educational and physical requirements shall be given an aptitude test and based upon the aptitude scores, personal interviews will be granted to the number determined in accordance with the formula hereinafter set forth.

C. ESTABLISHMENT OF QUALIFICATIONS:
Qualifications shall be established by:

1. Certificate of age from Local Board of Education or certified photostat of birth certificate (attach to application).
2. Applicants for admission to apprenticeship training during the years 1965-1966,—a school record attesting to the applicant's satisfactory completion of at least two years of high school study.
3. Applicants for admission to apprenticeship training during the years 1967-1968—a school record attesting to the applicant's satisfactory completion of at least three years of high school study.
4. Applicants for admission to apprenticeship training during 1969 or thereafter—a diploma or other proof of graduation

from an accredited high school, or an equivalency certificate establishing equivalent education.

5. **PROOF OF PHYSICAL FITNESS**—A medical examination pursuant to the form herein set forth, shall be given at a time, place and by a physician designated by the Committee. Physical standards, based upon requirements of the trade, shall be established and revised, from time to time, by a Medical Advisory Panel appointed by the Committee.

D. APTITUDE TESTING. Applicants who satisfy the age, educational and physical requirements will be eligible for Aptitude tests to be given at a time and place designated by the Committee by the New York University Testing and Advisement Center, Washington Square East, New York City or by equivalent University testing center.

- Test 1. Mental alertness.
 2. Mechanical reasoning.
 3. Space relations.
 4. Mathematical Computations and Concepts.
 5. Mathematical Analysis and problem solving.

Aptitude tests will be graded on a maximum score for all five tests to be 750 points.

E. INTERVIEWS—200% of the number of apprentices to be appointed who achieved the highest aptitude test scores shall be given a personal interview at a time and place and before a person or persons designated by the Committee. The interview procedures as established by the Committee, shall uniformly be applied to each applicant eligible for interview.

F. SELECTION SOLELY BY SCORES ATTAINED—Apprentices shall be appointed in order of rank, without regard to race, creed, color or national origin, after they have displayed qualifications in sufficient measure to meet minimum standards established by the committee.

G. INTERVIEW BOARD—Examining personnel for interview will be 50% representation from each of labor and management. Each interviewer will grade applicant individually

in accordance with specific maximum point allocations for various categories.

- H. (1) MAXIMUM TOTAL SCORES**—Total maximum score for any applicant shall be:

Tests	750 points
Interviews	<u>150 points</u>
	900 points

- (2) FINAL SELECTION**—The final selection of applicants shall be based on the determination of the total number of apprentices to be appointed.

I. NOTIFICATION TO APPLICANTS—Each applicant, at least 10 days prior to the commencement of the apprenticeship term for which he has applied, shall be:

1. Given written notification as to whether or not he has qualified for placement on the applicant list and, if he has so qualified, his ranking among the applicants. Further, such notification shall inform each qualified applicant whether or not he has been appointed and if not, the basis of non-appointment. The notification shall be sent by prepaid first class mail and the committee shall obtain from the postmaster, or his representative, a certificate of mailing showing the name and address of the addressee of the letter of notification.

2. Such notification shall set forth the terms of any appellate procedure afforded by the committee. Such appellate procedure shall provide for final determination and written 30 days of the appeal.

3. After the commencement of the term of an apprenticeship program, the committee may appoint available additional or replacement apprentices from the list in the order of their ranking thereon. Notice of such appointment shall be in writing. No applicant on the list may be passed over because of unavailability unless his unavailability extends seven days after delivery of notice.

4. Complete records of the selection process shall be maintained by the committee for two years, or the life of the

applicant list, whichever is greater, and shall be made available to the Industrial Commissioner upon request. Such records shall include copies of any written examinations taken by or documents submitted by or in connection with each applicant and a brief summary of each interview, if any, including the judgment of the interviewer for each applicant.

J. APPLICATION FEES—Costs of examining procedure—Applicants shall be required uniformly to pay to the Committee, at the time of filing applications, a reasonable fee not to exceed \$10.00 to cover the expenses of the examinations and examining procedures.

K. NOTIFICATION OF REJECTION—Applicants who are not accepted because of failure at any stage of qualification to meet the requirements and standards herein provided shall be notified as provided by Paragraph "I" above, but within ten (10) days after the decision is made by the Committee and the reasons for rejection shall be set forth in the notice and each applicant shall have the right of appeal hereafter set forth.

L. (1) REVIEW AND APPEAL RIGHTS OF REJECTEES.
Any applicant who has been notified of his rejection shall have the right to request, in writing, sent by mail or presented to the Joint Apprenticeship Committee at 350 Broadway, New York, New York, within ten (10) days after receipt of notice of rejection, a review of his case by the Joint Apprenticeship Committee. If a hearing is requested, it shall be held at the next regularly scheduled meeting of the Joint Apprenticeship Committee, but not later than thirty (30) days, after receipt of such review request.

(2) If the Joint Apprenticeship Committee sustains the rejection it shall notify the applicant thereof and shall further advise him of his right to obtain a review of his case by a member of a panel referred to in this sub-paragraph. The applicant may, within ten (10) days after receipt of the written decision of the Joint Apprenticeship Committee request a review by a member of a panel to be appointed

by the Presiding Justice of the Appellate Division of the Supreme Court, First Department.

(3) Any appeal shall be prosecuted, and the appeals officer shall be requested to render his decision, with all due speed, to the end that if the applicant's appeal is sustained and he is ordered installed in apprenticeship training, he may be installed in the class for which he applied.

PART III

APPRENTICESHIP TRAINING PROGRAM

1. **Hiring Apprentices.**—Employers desiring apprentices shall make written application for said apprentices to the Joint Apprenticeship Committee.

2. **Obligation of Apprentice.**—The applicant must read and sign the following obligations and file same with the Joint Apprenticeship Committee along with his application:

"I, the undersigned, having made application to be enrolled as an apprentice with the Joint Apprenticeship Committee, and, having read the standards formulated by said committee providing for training of apprentices, and understanding same, and all the conditions therein contained, do hereby agree to serve such time, and perform such manual training, and study such subjects as the committee may deem necessary to enable me to become a duly qualified journeyman sheet metal worker."

3. **Term of Apprenticeship**—The term of apprenticeship shall be not less than four years (approximately 7,000 hours) of reasonably continuous employment. It shall be divided into eight (8) periods of 875 hours each. The agreement between the Joint Apprenticeship Committee and any apprentice may be cancelled at any time by the Joint Apprenticeship Committee for good cause.

4. Work Experience—During the term of apprenticeship, the sheet metal apprentice may be given such instruction and experience in all branches of his trade as is necessary to develop a practical and skilled journeyman mechanic. He may also be given training in safety and safe working practices for shop and field. He may be given training in the operation of all machinery and be given operating experience thereon. He may be given training, and experience in working with all materials and substitutes which may be used in the shop or on the job during the term of his apprenticeship.

5. Schedule of Work Processes for Sheet Metal apprentice Training:

General Sheet Metal Work

Ventilating and Air Conditioning.

Specialty Installation and Specialty Work.

Kitchen equipment Work and Installation.

Kalamein Work and Installation.

Metal Door, Door Buck, Window Manufacturing and Installation.

School training as outlined under School Curriculum; first term through eighth term inclusive.

Approximately 7,000 hours—total. Eight terms of four years, training.

In the outline above, he may be given such training over the period of his apprenticeship as electric and gas welding, burning and brazing that is necessary for a sheet metal journeyman.

Part IV

RELATED SCHOOL INSTRUCTION

SCHOOL ATTENDANCE AND WAGES

(a) In addition to the training received on the job, an apprentice shall attend school one day each second week with pay. However, if the apprentice does not report for work the last working day before the first working day after his school

day, he shall not receive payment for his day at school. Time spent in school shall be a part of the four-year apprenticeship. Wages for a full day's attendance at school shall be eight hours straight time pay at the appropriate rate for the apprentices term rating.

REQUIREMENTS FOR STUDY

(b) The apprentice shall take such subjects for study as the Joint apprenticeship Committee shall require.

FAILURE TO FULFILL OBLIGATION

(c) In case of failure on the part of any apprentice to fulfill his obligation concerning school attendance, minimum scholastic achievements, the Joint Apprenticeship Committee may suspend or revoke his participation in the training program and the Employer shall carry out the instructions of the Joint Apprenticeship Committee in this respect.

LIMITED ATTENDANCE

(d) The Joint Apprenticeship Committee will limit attendance at courses for sheet metal apprentices to those who are actually apprenticed in the sheet metal trade in accordance with these standards.

(e) The related classroom instruction shall be under the direction of the Joint Apprenticeship committee which shall determine the subjects to be taught and any other problems pertaining to related education of the sheet metal apprentice.

TRAINING IN TRADE SPECIALTIES

(f) The Joint apprenticeship Committee may establish in accordance with the requirements of industry, training and upgrading programs for future draftsmen, foremen, and other specialists as required by the trade.

It is the purpose, intent and responsibility of the Joint Apprenticeship Committee continuously to upgrade this program to increase the curriculum and the school time requirements as facilities and finances permit.

PART V

MISCELLANEOUS PROVISIONS APPLICABLE TO THE
TRAINING PROGRAM AS APPLICABLE TO THE
APPRENTICES

1. Apprentice Work Card

WORK CARD—The apprentice shall carry an apprenticeship card signed by the Chairman and Secretary of the Joint Apprenticeship Committee. This card shall designate the contractor to whom the apprentice is assigned and the term of service.

The apprentice shall pay the tuition fees as established by the Joint Apprenticeship Committee to the person designated by the said Joint Apprenticeship Committee to collect tuition fees.

EXAMINATIONS

2. Periodic Examinations

At the expiration of each six month period each employer having in his employment one or more apprentices shall report to the Joint Apprenticeship Committee as to each apprentice's progress in his work, on forms to be submitted to the employer by the Joint Apprenticeship Committee; and the teachers shall report on the attendance and progress of each apprentice in his school work.

3. Apprentice Record Card

A master record of the apprentices' work experience and related instruction shall be kept by the Joint Apprenticeship Committee, this information to be furnished by the employer and the school instructors. The record cards and all data pertaining to the Apprenticeship Training Program shall be accessible to the members of the committee at all times.

WORKING HOURS

4. (a) The hours of work for the apprentices should be the same as those of a journeyman for the shop or job on which the apprentice is working.

4. (b) The daytime school session for apprentices shall be eight hours attendance every second week throughout the year as designated by the Joint Apprenticeship Committee. The Joint Apprenticeship Committee reserves the right to have apprentices make up lost school time. Apprentices will not be paid for make up school time.

WAGES

5. (a) A graduated wage scale for apprentices shall be established and maintained on a percentage basis of the established wage rates for journeymen sheet metal workers, as follows:

First year. . . first half 40% second half 45%
Second year. . . first half 50% second half 55%
Third year. . . first half 60% second half 65%
Fourth year. . . first half 70% second half 80%

PROBATION

6. (a) Every apprentice shall be deemed on probation during the full four year term of his apprenticeship. If during the probationary period, the contractor finds the apprentice is not suitable or unable to learn the trade, he shall notify the Joint Apprenticeship Committee.

DIVERSITY OF TRAINING

- (b) Where it is impossible for one contractor to provide the diversity of experience necessary to give an apprentice all-round instruction in the trade, the Joint Apprenticeship Committee may transfer him, temporarily or permanently, to another contractor, in which case the contractor to whom the apprentice is assigned will assume all the obligations of the original contractor. In no case, however, will an apprentice be transferred to a shop where there is a labor dispute.

NON-VESTING

7. Nothing contained in this agreement and nothing deriving from the appointment of any applicant to the status of apprentice shall be deemed or construed to vest in the apprentice any rights

or remedies against his employer or the Joint Apprenticeship Committee or Local 28, or any individual member of the Committee; his rights, and remedies being expressly limited to the right to receive wages for hours actually worked or spent at school.

PART VI

FORMS AND CURRICULUM

All forms and curricula adopted by the Joint Apprenticeship Committee are deemed incorporated herein by reference.

PART VII

MISCELLANEOUS

(a) The Rules and Regulations of the Industrial Commissioner of the State of New York heretofore adopted or which may hereafter be adopted by him, in so far as they are not inconsistent with the within Objective Standards governing the Admission of Apprentices and of the Order of the Court approving same, shall be deemed adopted into, and made part of, the within Objective Standards without specific inclusion.

(b) Any requirement for the advanced publication of notice of the intention of the Committee to accept applicants for new classes to be formed by the Committee, required to be given to any person or persons, or to any public body or bodies, by virtue of the provisions of any Federal or State law, or by virtue of the regulations of any governmental committee or officer having jurisdiction, shall be deemed incorporated into the within Objective Standards, and made a part hereof, without specific inclusion.

The foregoing Objective Standards were duly adopted by the Joint Apprenticeship Committee for the Sheet Metal Industry of New York, New York at a meeting of the aforesaid Joint Apprenticeship Committee held October 14th, 1964 to govern

the admission of applicants to the Apprenticeship Training Program.

Dated: October 14, 1964.

_____	_____
_____	_____
_____	_____
_____	_____

ATTESTATION

WE, the undersigned, the Trustees of the JOINT APPRENTICESHIP COMMITTEE & TRUST for the Sheet Metal Industry of New York City, N.Y. DO HEREBY CERTIFY AND ATTEST that at a meeting of the JOINT APPRENTICESHIP COMMITTEE & TRUST held at the premises of the Building Trades Employers' Association, 711 Third Avenue, New York City, October 14th, 1964, the foregoing Objective Standards to govern the admission of apprentices into apprenticeship training was duly adopted by unanimous vote of the Trustees.

This attestation is expected to be signed in counterparts by the respective Trustees and, when so signed, shall constitute a joint and several attestation of adoption of the Objective Standards by the Trustees.

Dated: October 14th, 1964.

EMPLOYER TRUSTEES

UNION TRUSTEES

_____	_____
_____	_____
_____	_____
_____	_____

Supplemental Opinion

[6] In implementation of the order of this court dated November 6, 1964, the parties have reported that they have agreed upon the institution of an apprenticeship class of 65 to commence not later than March 15, 1965. A stipulation to that effect has been submitted, approved by the court, and marked "So Ordered". The foregoing is reasonably fair and will generally effectuate the purposes of the order herein. It is also expected that henceforth new classes will be instituted on a periodic basis and will generally be selected to effectuate the public policy of this State as reflected in the order herein entered and that the union, employers, joint committee, and governmental agencies herein involved, will do their utmost to achieve and promote the objectives of the order. It is no longer the exclusive function of unions and employers to carry out apprenticeship programs. Governmental agencies charged with responsibility of enforcement of fair employment practices and equal economic opportunities for the general public, cannot be idle bystanders, but must actively participate to effectively regulate apprenticeship programs. Such governmental activities cannot be deemed undue, unreasonable, or unnecessary interference in labor-management matters.

This first apprenticeship class under the court order is the culmination of long conferences and arduous effort. The court expresses its appreciation to the parties and their counsel for the cooperative spirit demonstrated.

NOTICE OF MOTION
71 CIV. 2877
(HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP
. . . SHEET METAL AND AIR-CONDITIONING CONTRACTORS'
ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF
HUMAN RIGHTS,

Plaintiffs,

- against -

ABBOTT-SOMMER, INC., A.A.B. CO. SHEET METAL CO.,
ACOUSTECHS SHEET METAL CORP., AIR DAMPER MFG. CORP.,
AIRITE VENTILATING CO. INC., ALLEN SHEET METAL WORKS,
INC., ALLIED SHEET METAL WORKS INC., ALPINE SHEET METAL
& VENTILATING, CO., INC., ARCHER SHEET METAL INC., ARROW
LOUVER & DAMPER CORP., BAYCHESTER ROOFING & SHEET
METAL, INC., BRUMAR INC., BUNKER INDUSTRIES, INC., CENTER
SHEET METAL, COASTAL SHEET METAL CORP., COLONIAL
ROOFING CO., INC., COLUMBIA VENTILATING COMPANY, INC.,
CONTRACTORS SHEET METAL, INC., CRAFT SHEET METAL WORKS,
INC., DELTA SHEET METAL CORP., DORITE SHEET METAL, ESSEX
METAL WORKS, INC., FASANO SHEET METAL CO., INC., J.J.
FLANNERY, INC., GENERAL FIREPROOF DOOR CORP., GENERAL
SHEET METAL WORKS, INC., GENTLEMAN SHEET METAL
LIMITED, GLOBAL SERVICES & INSTALLATION, INC., HARRINGTON
ASSOCIATES, INC., HOWARD MARTIN CO., INC., IMPERIAL DAMPER
& LOUVER CO., INDUSTRIAL METAL FABRICATORS, DARO SHEET
METAL CORP., KAY ROOFING COMPANY, INC., KENMAR SHEET

METAL CORP., K.G. SHEET METAL, INC., L.P. KENT CORP.,
MODERN KITCHEN EQUIPMENT CORP., A. MUNDER & SON, INC.,
NATIONAL ROOFING CORP., NATIONWIDE ACOUSTIC FOIL NOISE
CONTROL PRODUCTS, NEW YORK SHEET METAL WORKS, INC.,
W.H. PEEPELS COMPANY, INC., PENTA SHEET METAL CORP.,
PERFECT CORNICE & ROOFING CO., INC., PHOENIX SHEET METAL
CORP., DANIEL J. RICE, INC., HUGH RICHARDS ASSOCIATES, INC.,
ROMAR SHEET METAL, INC., JOHN SCHNEIDER ROOFING
CONTRACTORS, INC., SHAPIRO EQUIPMENT CO., INC., SIMPSON
METAL INDUSTRIES, INC., SOBEL & KRAUS, INC., SPRINGFIELD
SHEET METAL WORKS, INC., STEELTOWN SHEET METAL & IRON
WORKS, INC., SUMAR SHEET METAL, INC., A. SUNA & COMPANY,
INC., LOUVER LITE CORP., ASCO ROOFING CORP., SUPREME
FIREPROOF DOOR CO., INC., SWIFT SHEET METAL CO., INC.,
SWIFT SHEET METAL CORP., TEMPCO COMPANY INC., HERMAN
THALMAN CO., TRIANGLE SHEET METAL INC., TROPICAL
VENTILATING CO., INC., TUTTLE ROOFING COMPANY, INC.,
UNIVERSAL SHEET METAL CORP., UNIVERSAL ENCLOSURES,
WOLKOW-BRAKER ROOFING CORP., AIR-BALANCING & TESTING
CO., AIR CONDITIONING & BALANCING CO., INC., ALL TYPES
STACKS & CHUTES, AMSCO SYSTEMS (AMERICAN STERILIZER),
ARCHITECTURAL ACOUSTICS, ASSOCIATED TESTING & BALANCING
INC., BAL TEST CORP., CHIMNEY & CHUTES CO., CIRCLE
ACOUSTICS CORP., COLLYER ASSOCIATES, INC., EASTERN ACOUSTIC
CORP., EFFICIENT TOWERS INC., ENSLEIN BLDG. SPECIALTIES,
INC., ESS & VEE ACOUSTICAL CONTRACTORS, INC., FISHER
SKYLIGHTS INC., INTERNATIONAL TESTING & BALANCING CORP.,
JACOBSON & COMPANY, INC., JERMIAH BURNS INTERIOR SYSTEMS,
INC., JOHNSON CONTROLS, MECHANICAL BALANCING CORP. JOHN
MELEN, INC., MORSE BOULGER, INC., R.H. McDERMOTT CORP.,
NAB TERN CONSTRUCTION, NATIONAL ACOUSTICS, QUALITY
ERECTORS, WILLIAM J. SCULLY ACOUSTIC CORP., SUPERIOR
ACOUSTICS, SYSTEMS TESTING & BALANCING, INC., U.S. CHUTES,
WETZEL CONTRACTING CORP., WILLOPEE ENTERPRISES, WOLFF &
MUNIER INC., APEX CHUTES & MANUFACTURING, INC., MODERN
SHEET METAL WORKS INC., CALMAC-MANUFACTURING CO.,
COOLENHEAT, DE SAUSSURE EQUIPMENT CO., INDUSTRIAL
ACOUSTICS CO., INC., INDUSTRIAL IRON & STEEL, INSUL-
COUSTIC/BERMA CORP., JERSEY STEEL DRUM MFG. CORP.,

KENCO PRODUCTS CORP. MARATHON INDUSTRIES INC., PHOENIX
STEEL CONTAINER CORP., RICH MANUFACTURING CORP.,
STERNVENT.CO.,

Respondents.

PLEASE TAKE NOTICE, that upon the annexed affidavits of Charles R. Foy and Sheila Abdus-Salaam, sworn to the 16 day of April, 1982 respectively, the City of New York and the New York State Division of Human Rights will move this Court at the Courthouse at Foley Square, New York, New York on June 10, 1982 at 10:00 a.m. or as soon thereafter as counsel may be heard for an order citing defendants and respondents for civil contempt and granting the following relief:

1) require defendants to pay compensatory fines in the amount of \$182,500 (\$100 dollars a day from July 1, 1977 through June 30, 1982);

2) require defendants to pay coercive fines in such amounts as this Court deems appropriate to ensure prompt compliance with this Court's orders.

3) establish a central job reporting system which would require, *inter alia*, the respondent contractors to notify Local 28 of each Local 28 member hired, and to state for each such hire: name, address, phone number, race, contractor's name, and length of job for which hired; and which would require the union to report quarterly to plaintiffs and the Court on all such new hires;

4) require the defendants to conduct an effective publicity and outreach campaign;

5) enjoin enforcement of the age requirement in the present collective bargaining agreement because of its discriminatory impact on non-whites;*

* For purposes of this case the term "non-whites" is used to refer to Black and Spanish surnamed individuals. 401 F. Supp. at 470, n.1.

6) increase the non-white union membership goal to reflect the increased non-white minority labor pool;

7) award the City and State their attorneys fees and costs; and

8) award such other and further relief as will ensure prompt compliance with this Court's orders and equal employment opportunities for non-whites in the sheet metal trade and industry.

Dated: New York, New York
April 16, 1982

Respectfully submitted,

/s/ SHEILA ABDUS-SALAAM

ROBERT ABRAMS

Attorney General of the State
of New York
Attorney for the State Division
of Human Rights
Two World Trade Center
Suite 46-57
New York, N.Y. 10047
Tel. (212) 488-7510

DEBORAH BACHRACH
Bureau Chief, Civil Rights Bureau
Assistant Attorney General

SHEILA ABDUS-SALAAM
Assistant Attorney General of Counsel

/s/ CHARLES R. FOY

 FREDERICK A. O. SCHWARZ, JR.
 Corporation Counsel
 Attorney for the City of New
 York
 100 Church Street
 Room 6-C-14
 New York, N.Y. 10007
 Tel. (212) 566-2309/2191

JUDITH A. LEVITT
 CHARLES R. FOY
 MERYL R. KAYNARD
Assistant Corporation Counsels of Counsel

AFFIDAVIT IN SUPPORT OF MOTION FOR
 ORDER OF CONTEMPT
 71 CIV. 2877

(HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
 THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
 INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP
 COMMITTEE . . . SHEET METAL AND AIR-CONDITIONING
 CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

THE CITY OF NEW YORK, and
THE STATE DIVISION OF HUMAN RIGHTS,

Plaintiffs,

- against -

ABBOTT-SOMMER, INC., A.A.B. CO. SHEET METAL CO., ACOUSTEHS SHEET METAL CORP., AIR DAMPER MFG. CORP., AIRITE VENTILATING CO. INC., ALLEN SHEET METAL WORKS, INC., ALLIED SHEET METAL WORKS INC., ALPINE SHEET METAL & VENTILATING, CO., INC., ARCHER SHEET METAL INC., ARROW LOUVER & DAMPER CORP., BAYCHESTER ROOFING & SHEET METAL, INC., BAYSIDE ROOFING CO., INC., BROOK SHEET METAL, INC., BRUMAR SHEET METAL CORP., BUILDERS SHEET METAL WORKS, INC., BUNKER INDUSTRIES, INC., CENTER SHEET METAL, COASTAL SHEET METAL CORP., COLONIAL ROOFING CO., INC., COLUMBIA VENTILATING COMPANY, INC., CONTRACTORS SHEET METAL, INC., CRAFT SHEET METAL WORKS, INC., DELTA SHEET METAL CORP., DORITE SHEET METAL, ESSEX METAL WORKS, INC., FASANO SHEET METAL CO., INC., J.J. FLANNERY, INC., GENERAL FIREPROOF DOOR CORP., GENERAL SHEET METAL WORKS, INC., GENTLEMAN SHEET METAL LIMITED, GLOBAL SERVICES & INSTALLATION, INC., HARRINGTON ASSOCIATES, INC., HOWARD MARTIN CO., INC., IMPERIAL DAMPER & LOUVER CO., INDUSTRIAL METAL FABRICATORS, KARO SHEET METAL CORP., KAY ROOFING COMPANY, INC., KENMAR SHEET METAL CORP., K.G. SHEET METAL, INC., L.P. KENT CORP., MODERN KITCHEN EQUIPMENT CORP., A. MUNDER & SON, INC., NATIONAL ROOFING CORP., NATIONWIDE ACOUSTIC FOIL NOISE CONTROL PRODUCTS, NEW YORK SHEET METAL WORKS, INC., W.H. PEEPELS

COMPANY, INC., PENTA SHEET METAL CORP., PERFECT CORNICE & ROOFING CO., INC., PHOENIX SHEET METAL CORP., DANIEL J. RICE, INC., HUGH RICHARDS ASSOCIATES, INC., ROMAR SHEET METAL, INC., JOHN SCHNEIDER ROOFING CONTRACTORS, INC., SHAPIRO EQUIPMENT CO., INC., SIMPSON METAL INDUSTRIES, INC., SOBEL & KRAUS, INC., SPRINGFIELD SHEET METAL WORKS, INC., STEELTOWN SHEET METAL & IRON WORKS, INC., SUMAR SHEET METAL, INC., A. SUNA & COMPANY, INC., LOUVER LITE CORP., ASCO ROOFING CORP., SUPREME FIREPROOF DOOR CO., INC., SWIFT SHEET METAL CO., INC., SWIFT SHEET METAL CORP., TEMPCO COMPANY INC., HERMAN THALMAN CO., TRIANGLE SHEET METAL INC., TROPICAL VENTILATING CO., INC., TUTTLE ROOFING COMPANY, INC., UNIVERSAL SHEET METAL CORP., UNIVERSAL ENCLOSURES, WOLKOW-BRAKER ROOFING CORP., AIR-BALANCING & TESTING CO., AIR CONDITIONING & BALANCING CO., INC., ALL TYPES STACKS & CHUTES, AMSCO SYSTEMS (AMERICAN STERILIZER), ARCHITECTURAL ACOUSTICS, ASSOCIATED TESTING & BALANCING INC., BAL TEST CORP., CHIMNEY & CHUTES CO., CIRCLE ACOUSTICS CORP., COLLYER ASSOCIATES, INC., EASTERN ACOUSTIC CORP., EFFICIENT TOWERS INC., ENSLEIN BLDG. SPECIALTIES, INC., ESS & VEE ACOUSTICAL CONTRACTORS, INC., FISHER SKYLIGHTS INC., INTERNATIONAL TESTING & BALANCING CORP., JACOBSON & COMPANY, INC., JERIMAH BURNS INTERIOR SYSTEMS, INC., JOHNSON CONTROLS, MECHANICAL BALANCING CORP. JOHN MELEN, INC., MORSE BOULGER, INC., R.H. McDERMOTT CORP., NAB TERN CONSTRUCTION, NATIONAL ACOUSTICS, QUALITY ERECTORS, WILLIAM J. SCULLY ACOUSTIC CORP., SUPERIOR ACOUSTICS, SYSTEMS TESTING & BALANCING, INC., U.S. CHUTES, WETZEL CONTRACTING CORP., WILLOPEE ENTRISES, WOLFF & MUNIER INC., APEX CHUTES & MANUFACTURING, INC., MODERN SHEET METAL WORKS INC., CALMAC-MANUFACTURING CO., COOLENHEAT, DE SAUSSURE EQUIPMENT CO., INDUSTRIAL ACOUSTICS CO., INC., INDUSTRIAL IRON & STEEL, INSUL- COUSTIC/BERMA CORP., JERSEY STEEL DRUM MFG. CORP., KENCO PRODUCTS CORP., MARATHON INDUSTRIES ICN., PHOENIX STEEL CONTAINER CORP., RICH MANUFACTURING CORP., STERNVENT CO.,

Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CHARLES R. FOY, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, attorney for plaintiff City of New York ("City").

2. I am fully familiar with the facts and circumstances herein. I submit this affidavit in support of the joint motion by the City and the State Division of Human Rights ("State") for an order citing defendants Local 28 of the Sheet Metal Workers' International Association ("Local 28"), Local 28 Joint Apprenticeship Committee ("JAC"), the Sheet Metal and Air Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association") and one hundred and twenty-one individually named Local 28 contractors ("respondents") for civil contempt of court.

I. Prior Proceedings

3. This action was originally commenced by the Equal Employment Opportunity Commission ("EEOC") in 1971 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.*, charging *inter alia*, that Local 28, the JAC and the Contractors' Association had engaged in a pattern and practice of discrimination against Black and Spanish-surnamed individuals with respect to recruitment, selection, training and admission into Local 28, admission into membership in the Local 28 Apprenticeship Program, and employment opportunities as sheet metal workers in New York City.

4. On June 6, 1972 the City moved pursuant to Rule 24(a) of the F.R. Civ. Pro. to intervene in this proceeding because the City Commission on Human Rights had pending before it an administrative proceeding against Local 28 which would be affected by a decree in this action. The motion to intervene was granted on June 14, 1972. The State was named as a defendant by Local 28 and the JAC in third and fourth-party complaints because of administrative and judicial proceedings instituted by

the Attorney General against them in which they were ordered to end racially discriminatory selection and admission practices under the supervision and direction of the State Division of Human Rights. *State Commission for Human Rights v. Farrell*, 43 Misc. 2d 958 (Sup. Ct., N.Y. Cty. 1964).

5. The action was tried from January 13, 1975 to February 3, 1975. In a decision dated July 18, 1975 Judge Henry F. Werker held that Local 28 and the JAC had illegally denied non-whites access to employment opportunities in the sheet metal trade. (401 F. Supp. 467.) Judge Werker held that Local 28 and the JAC denied non-whites such employment opportunities by, *inter alia*, (a) failing to administer yearly validated journeymen tests; (b) selectively organizing non-union sheet metal shops with few non-white employees, and/or admitting from such shops only white employees; (c) accepting as transfer members whites from affiliated sister locals while refusing transfers of non-whites; and (d) utilizing an apprenticeship examination which had an adverse impact upon non-whites and which was not job-related.

6. On August 28, 1975 an Order and Judgment was entered in this action. (A copy of the Order and Judgment is designated Exhibit "1".)* The Order and Judgment provided, in part, that Local 28 and the JAC achieve a non-white percentage of 29% in the combined membership of Local 28 and the JAC apprenticeship program (§11), undertake a program of advertising and publicity to inform the non-white community of non-discriminatory opportunities in Local 28 and the Apprenticeship Program (§21(h)), keep specified records and lists (§21(e)), and not issue permits without the Administrator's approval (§s 6 and 22(f)). In addition, the Order and Judgment enjoined the defendants from any act or practice which would have the purpose or effect of discriminating in recruitment, selection, training, admission to membership in Local 28, admission to membership in the Apprenticeship Program, referral or any terms and conditions of employment on the basis of race, color or national origin. (§s 1, 7 and 8.)

* The Exhibits to this affidavit are numbered consecutively and are submitted in separate binder.

7. Pursuant to the Order and Judgment, an Affirmative Action Program and Order ("Program") had been entered on November 25, 1975. This Program was required to be modified by the Court of Appeals' decision dated March 6, 1976 (532 F.2d 821). That decision did not affect the provisions of the Order and Judgment relied upon herein, which were affirmed. *Id.* A Revised Affirmative Action Program and Order ("RAAP & O") was entered on January 19, 1977. (A copy of the RAAP & O is designated Exhibit "2"). The RAAP & O specified the methods by which defendants were to comply with the Order and Judgment's provisions. These methods included defendants seeking governmental training funds (§20(d)) and following specified procedures for determining the number of apprentices to be indentured each term (§19). Defendants challenged six of the RAAP & O's provisions on appeal. The challenge was found to be without merit and the RAAP & O was affirmed. (565 F.2d 31 (2d Cir. 1977)).

II. Parties

8. While individual sheet metal contractors are not named parties to this action, they have been enjoined from discriminatory employment practices. (See §7 above.) By a Memorandum and Order of the Administrator dated July 30, 1979 and an Amended Memorandum and Order ("AMO") dated March 12, 1980* (copies of these orders are designated as Exhibit "3"), the Administrator directed the City and the E.E.O.C. to serve by certified mail members of defendant Contractors' Association, employers who have a contractual relationship with Local 28 and employers who utilize JAC apprentices with a certified copy of the Order and Judgment and the RAAP & O. By so serving these employers plaintiffs put them on notice of their obligations under the Order and Judgment and the RAAP & O. Each of these contractors are named as respondents to this motion. Other sheet metal contractors who

* During the course of this litigation, the Administrator has issued several orders. However, for the purposes of this motion two are particularly relevant - - the AMO and the September 10, 1980 Memorandum and Order. (A copy of the September 10, 1980 Memorandum is designated Exhibit "5").

were not served with a copy of the Order and Judgment and the RAAP & O are joined as respondents based upon information and belief that they have a contractual relationship with Local 28 pursuant to a collective bargaining contract and, therefore, have actual knowledge of the Order and Judgment and the RAAP & O. (See, Listing of Firms Employing Local 28 members annexed hereto as Exhibit "4").

III. Events Leading to this Motion

9. In a Memorandum Opinion and Order dated September 10, 1980 the Administrator stated that "during my review of the record it became apparent that the reasons for not reaching the interim goals are sketchy, at best". To ensure that there was a single comprehensive record of the prior five years the Administrator directed Local 28 and the JAC to prepare reports setting forth, *inter alia*, the efforts they have made since 1975 to meet the RAAP & O's interim goals, why such goals were not met, what action was taken to counter the problems of the previous year and how economic conditions affected meeting the goals. In addition, Local 28 and the JAC were directed to prepare a detailed proposed plan of action for the following two years. On December 15, 1980, Local 28 and the JAC filed their respective reports with the Administrator. (Copies of the JAC and Local 28's Reports are designated Exhibits "11" and "12".) Neither the JAC nor Local 28's reports contained detailed proposed plans of action for the following two years.

10. Prior to filing its comments on defendants' reports the City undertook discovery which included taking depositions of various contractors and serving interrogatories upon Local 28 and the JAC. On August 3, 1981 the City filed its Report and Comments with the Administrator and this Court. The EEOC also filed a Report with the Administrator on August 3, 1981.

11. The City's Report outlined a complete failure by defendants not only to reach the RAAP & O's interim goals, but also to comply with several other substantive provisions of the Order and Judgment and the RAAP & O. The instant motion for contempt is an outgrowth of the defendants' contemptuous acts

as detailed in the City's Report of the defendants' violations of the Order and Judgment and the RAAP & O.

IV. *Violations of The Order and Judgment, the RAAP & O, the Administrator's March 12, 1980 Amended Memorandum and Order ("AMO") and the Administrator's September 10, 1980 Order.*

12. The Order and Judgment as well as the RAAP & O require defendants to take affirmative steps to overcome their history of discriminatory acts. A review of the defendants' actions during the past six years, documents they have submitted to the parties and Administrator and depositions of various contractors reveals that not only have defendants failed to take such affirmative steps, but that they have engaged in the following apparently widespread and continuing violations which directly evidence discrimination:

(a) the failure to undertake a program of advertising and publicity designed to inform the non-white community of non-discriminatory opportunities in Local 28 and the Apprenticeship Program. See, ¶21(h) Order and Judgment and ¶38 RAAP & O;

(b) the failure to meet even one of the RAAP & O's interim goals and not being within reach of 29% non-white membership by July 1, 1982. See, ¶11 Order and Judgment and ¶2 RAAP & O;

(c) the denial to non-whites of employment rights whites enjoy during periods of unemployment in the sheet metal industry. See, ¶s 1, 2 and 7 Order and Judgment;

(d) the failure to keep required records. See, ¶21(e) Order and Judgment; §20(d), 33(a-p) 34(a), 34(b), 35(a), (b), (d); AMO ¶s (a), (b), (c);

(e) utilizing permit men without the express written approval of the Court-appointed Administrator. See, ¶s 6 and 22(f) of the Order and Judgment and ¶17 of the RAAP & O;

(f) the failure to take necessary steps to seek out and apply for governmental training funds. See, ¶20(d) RAAP & O;

(g) the failure to follow the required procedures in determining the number of apprentices to be indentured each term. See, ¶19 RAAP & O;

(h) the failure to fully comply with the Administrator's September 10, 1980 order.

The net effect of these violations has been the continued denial of employment in the sheet metal trade to non-whites.

V. *Evidence of Violation of the Order and Judgments and the RAAP & O*

(a)

13. The Order and Judgment and the RAAP & O requires defendants to have undertaken an effective general publicity campaign designed to inform the non-white community of non-discriminatory opportunities in Local 28 and the Apprenticeship Program. Pursuant to ¶39 of the RAAP & O the defendants were to have submitted to the Administrator in April, 1977 a written plan for the implementation of the general publicity campaign. No such plan has ever submitted by the defendants.

14. In an industry such as the construction trades where discrimination has been long standing and judicially recognized, a court mandated general publicity campaign has special force. At the time of the Order and Judgment the construction trades were in a severe depression. Prior to the Order and Judgment defendants had taken no steps to insure that a pool of qualified non-whites would be available to hire when the industry improved. The required general publicity campaign would have been a major step to insure that such a manpower reserve would exist.

(b)

15. Defendants Local 28 and JAC have failed to achieve the remedial goals for non-white membership in Local 28 set forth

in the Order and Judgment and the RAAP & O. The Order and Judgment directed Local 28 and the JAC to achieve a non-white percentage of 29% in the combined membership of Local 28 by July 1, 1981. Subsequently, the defendants were granted in the RAAP & O an additional year to reach this goal. The RAAP & O established the following interim percentage goals:

July 1, 1976	5 %
July 1, 1977	8 %
July 1, 1978	11 %
July 1, 1979	15 %
July 1, 1980	19 %
July 1, 1981	24 % —

16. Defendants admit a failure to comply with these goals. On April 1, 1977 non-white membership in Local 28 totalled 5.44%. (See, October 6, 1977 letter from Daniel Wilton to David Raff, a copy of which is designated as Exhibit "6".) As of December 30, 1978 non-whites comprised 6.58% of Local 28's total membership. (See, October 29, 1979 letter from Daniel Wilton to David Raff which is designated as Exhibit "7".) In July, 1980 the non-white membership reached 8.5%. (See, Exhibit "12" ¶7). On May 7, 1981 non-white membership in Local 28 fell to 7.7%. (See, May 7, 1981 letter from Daniel Wilton to David Raff, a copy of which is designated as Exhibit "8".)

17. The defendants' own statistics underscore their complete failure to meet the interim goals. Since 1977 there has been a decrease in the number of non-white journeymen (See Exhibits "6" and "8"), as well as a substantial dropoff in the percentage of non-white apprentices in the JAC program. (See, Exhibits "6" and "8").

18. The 29% goal was established in accordance with the percentage of non-whites among New York City's population in 1970. In the intervening years New York City's non-white

population has increased to 45%, giving the defendants a larger pool of individuals to draw from.*

(c)

19. Defendants Local 28 and the Contractors' Association, as well as the individually named contractors recently entered into a collective bargaining agreement, the terms of which will result in those few non-whites presently in the union being among those first laid off. The relevant provision reads as follows:

During periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field. (A copy of the collective bargaining agreement is designated as Exhibit "10.")

20. While the exact numbers of whites who are protected by this provision must await further discovery, upon information and belief it is expected that discovery will reveal that non-whites are disproportionately excluded from the provision's benefits. This conclusion is anticipated because (a) as of July 1, 1974 3.19% of Local 28's non-membership was non-white (see, *EEOC v. Local 638 . . . Local 28*, 401 F. Supp. 467, 474 [SDNY 1975]); (b) since July, 1975 the overwhelming majority of non-whites accepted into Local 28 entered via the apprenticeship program; (c) applicants for apprenticeship may not be older than 25 except for veterans of active military duty the age limit is extended one year for each year of duty up to age 30 and to 35 for non-whites applying for advanced apprenticeship standing who are citizens or permanent aliens. (See, Exhibit "2", RAAP & O ¶22.)

21. As a layoff system which discriminates against non-whites and which was established subsequent to the enactment of Title VII and the entry of court orders enjoining such a discriminatory

* Note, the City and the State challenged the accuracy of the 1980 census for New York. They maintained that non-whites were under-counted by more than 600,000 in New York City. *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980); *rev'd* 653 F. 2d 732 (2d Cir. 1981); *cert. den.* S. Ct. (March, 1982).

practice (See, Exhibit "2", RAAP & O ¶40), this collective bargaining provision violates the orders of this Court.

(d)

22. In several key respects defendants have not complied with the Order and Judgment, the RAAP & O and the AMO's reporting requirements. (A copy of the AMO is designated as Exhibit "3"). It is through records provided by defendants that the plaintiffs are able to evaluate defendants' compliance with the Order and Judgment and determine what methods can assist the defendants in compliance.

23. Paragraph 20(c) of the RAAP & O requires that Local 28 inform all the parties which whites and non-whites inquire regarding permits and which whites and non-whites receive such permits and the date of such inquiries and issuance of permits. Local 28 has not done so and continues not to do so despite repeated inquiries by City's counsel at depositions, applications to the Administrator for permit men and conversation with City's counsel concerning the issue. (See, V(e) herein.) Only through the City's deposing Local 28 contractors and serving interrogatories upon Local 28 was the fact that journeymen had received permits disclosed. Between August, 1981 and February 1982 there were seventy-nine (79) permit men employed by Local 28 contractors. Plaintiffs were not notified that any of these individuals made inquiries.

24. The JAC has also failed to advise the parties and the Administrator whenever an employer receives a contract from the City, State or Federal governments. See, Exhibit "2", RAAP & O ¶20(d). Due to the defendants' failure to submit such information, it has fallen to the City to gather information concerning City contracts for the Administrator and the parties. The defendants have also failed, except on one occasion, to submit a bi-monthly listing of all current construction involving sheetmetal, as requested by the City on September 7, 1981 pursuant to ¶(e) of the AMO. In addition, defendants have never submitted quarterly and annual compilations of journeymen and apprentice hours of sheet metal work as required by ¶(c) of the AMO. Defendants also have disregarded ¶(a) of the AMO in that

they have supplied updated quarterly employee lists only once in the past two years.

25. The defendants have also ignored several provisions of the Order and Judgment and the RAAP & O requiring submission of certain data. The data includes the following:

(a) Quarterly reports with separate white and non-white data. (Last received July 7, 1980). Order and Judgment ¶21(e) RAAP & O ¶33(a-p).

(b) Listing, by race, of persons admitted to journeyman or apprentice status. RAAP & O ¶34(a).

(c) Census of Local 28 membership including the percentage of non-whites in each category. (Last received May 7, 1981). RAAP & O ¶34(b).

(d) Listing of persons (including name, race, telephone number and address) who requested or filed an application for each apprentice exam. (Only received number of applicants by race January 7, 1981). RAAP & O ¶35(b).

(e) Report containing (a) name and race of each person rejected as apprentice applicant and the reason for rejection, (b) names of persons whose applications became inactive and why. (Never received). RAAP & O ¶35(b).

(f) Report containing names of non-whites terminated from the apprentice program, including the reason for termination, efforts made to retain them and their training and employment history while in apprentice program. RAAP & O ¶35(d). These reports are due twenty days after an apprentice is terminated. Plaintiffs received no such reports for 1979, early 1980 or after February, 1982. Reports were received concerning apprentices terminated in late 1980, all of 1981 and January, 1982. However, these reports were received in March, 1981 and February, 1982, months after they were due.

(e)

26. Pursuant to paragraphs 6 and 22(f) of the Order and Judgment and paragraph 17 of the RAAP & O the defendants must obtain the Administrator's approval prior to utilizing

permit men. While conducting discovery in connection with its Report the City found that several Local 28 contractors had permit men on jobs without prior approval from the Administrator. (See, Defendant Local 28's Responses to City's Interrogatories, dated June 15, 1981, a copy of which is designated Exhibit "14", ¶9.)

27. On May 1, 1981 Edmund D'Ella, counsel for Local 28, sought to obtain the City's consent for permit men to work for General Sheet Metal. This request came only after the City had deposed several contractors and raised the issue of unauthorized permit men. (See, e.g. April 27, 1981 Deposition of Sigmund Ansel, designated Exhibit "15"). The City withheld its consent for the permit men because Local 28 refused to provide it with information the City felt was necessary to evaluate the need for permit men. Despite having no authorization to do so Local 28 issued permits for six men to work for General Sheet Metal. These six joined five other permit men already working for General. (See, Exhibit "14", ¶9). At this time, two other Local 28 contractors also had permit men working without the Administrator's or the plaintiffs' approval. (*Id.*) All thirteen of these permit men are white.

28. In evaluating the seriousness of these violations of the Order and Judgment it must be considered that this Court has held the use of permit men has "the illegal effect of denying non-whites access to employment opportunities in the industry." *EEOC v. Local 638 ... Local 28, supra* at 485. Inasmuch as Local 28 has continually failed to take required affirmative steps to assure a pool of qualified non-white journeymen (See, V(a) herein), its unauthorized utilization of permit men must be viewed as a continuation of past discriminatory practices.

(f)

29. Paragraph 20(d) of the RAAP & O requires that the JAC "take all necessary steps to seek out and apply for governmental manpower training funds." The JAC claims it has met this requirement in that it "has taken steps in connection with seeking out governmental manpower training funds." (See, Exhibit "12", p. 10). This position is based upon a letter dated

February 16, 1978 which states that in connection with seeking out governmental manpower funds the JAC has:

1. Actively participated in the Building Trades Councils Committee established to obtain government funding.
2. Met with Sal Crivelli of the U.S. Department of Labor to explore avenues of funding.
3. Communicated with the manpower committees of Congress to obtain information as to what funding is available and what future legislation is contemplated.
4. Appointed Thomas Carlough, formerly Director of Local 400 JAC, to actively pursue funding possibilities.

30. No funding proposals or actual funding resulted from these efforts. (*Id.*; see also, Memorandum Decision of Judge Werker dated February 1, 1980, p. 2, designated Exhibit "16"). Due to this inaction on the JAC's part the Administrator was forced to apply to the state of New York in May 1979 for funding of \$500,000 under the Comprehensive Employment and Training Act ("CETA") in order to provide training for 30 apprentices in the sheet metal trade. The JAC and Local 28 opposed the Administrator's action and, in part, caused a delay in the CETA application being processed. This delay has caused the loss of at least 30 potential CETA apprentices, most of whom it is assumed would be non-white, thereby preventing them from being trained in the sheet metal trade.

31. Only recently has a second CETA application been preliminarily approved. In the reduced amount of \$160,000, this grant will provide for the training of only 12 CETA applicants. At no time has the JAC or Local 28 made any efforts to assure the acceptance of either of the Administrator's CETA applications, nor have they themselves made any application for governmental training funds.

32. In view of the fact that the parties have had difficulty in agreeing upon a validated apprenticeship test and that the last apprenticeship test resulted in low numbers of non-whites passing, the defendants' opposition to and failure to apply for the funding of governmental training programs such as CETA, which

traditionally have large numbers of non-white participants, can only be characterized as a serious violation of the requirements of the RAAP & O.

(g)

33. Paragraph 19(b) of the RAAP & O requires that the JAC submit its recommendation of the number of apprentices to be indentured in each apprentice class no later than 90 days before each class is to be indentured. The recommendation is to be accompanied with a report stating the basis for the recommendation.

34. During the past several years the JAC has not complied with ¶19(b)'s provisions. The JAC has made it a practice to state to the parties one or two weeks before the indenturing of a class that no less than a specified number of apprentices were to be indentured. The plaintiffs have not been informed of the exact number of apprentices or the exact date of indenturing until after the apprentices had been indentured. Reports setting forth the basis for the recommended number of apprentices have never been submitted by the JAC.

35. These practices of the JAC have made it difficult for the plaintiffs to intelligently plan how to deal with various manpower problems and issues. It also made it impossible to effectively evaluate the JAC's actual recommendation and has nullified the provision in ¶19(b) of the RAAP & O allowing plaintiff 15 days to object to the JAC's recommendations.

(h)

36. By an order dated September 10, 1980 the Administrator required that the defendants submit reports setting forth, *inter alia*, a "detailed proposed plan of action for the following two years." (See Exhibit "5"). While both the JAC and Local 28 filed reports with the Administrator neither report contained a detailed proposed plan of action. (See Exhibits "11" and "12").

37. Defendants' failure to set forth a detailed plan of action is consistent with their passive approach to improving the position of victims of their past discrimination. (See, V(a), (b) and (f)). When viewed together with defendants' deliberate acts of

noncompliance with this Court's orders, (See, V(c), (d), and (g)), such a passive approach evidences a contemptuous disregard for both the spirit and the intent of the Order & Judgment and the RAAP & O.

VI. The Relief Sought

38. The City and the State is seeking seven basic forms of relief pursuant to its contempt motion.

a. The undertaking by the defendants of an effective general publicity campaign to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Local 28 Apprenticeship Program, as required by ¶2(h) of the Order and Judgment and ¶39 of the RAAP & O;

b. The creation of a central job reporting system which would ensure that non-whites receive equal employment opportunities;

c. The appointment by the Court of an impartial individual to monitor, supervise and, if necessary direct the operations of the central job reporting system;

d. The enjoining of the provision in the current Local 28 Collective Bargaining Agreement which states that "during periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field," as violative of the Order and Judgment, the RAAP & O and Title VII;

e. The assessment of fines against the defendants and respondents to compensate non-whites for the harm caused them by defendants' and respondents' contemptuous acts, to coerce future compliance by the defendants and respondents and to implement the relief sought herein;

f. The creation of a special fund which would be used for scholarships to train non-whites in New York City in areas, other than the sheet metal trades in which job opportunities are expanding; and

g. An increase in the remedial goal to reflect the present relevant labor force.

(a)

39. *General Publicity Campaign.* The City requests that the defendants submit to the Administrator and the other parties a written plan for an effective general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Apprenticeship Program. This plan would include, but not be limited to public service announcements, radio and newspaper advertisements, person to person outreach and would include information concerning the operation of a central job reporting system established pursuant to this motion for contempt. After comment by the other parties, and the Administrator having considered all submissions and revising the plan as necessary, such plan would be put into effect after the establishment of a central job reporting system. It is anticipated that some of the harm done by defendants' failure to undertake a general publicity campaign in 1977, such as the loss of good faith in the non-white community and a failure to develop a pool of qualified non-white sheet metal workers, can be overcome by defendants now undertaking such a general publicity campaign.

(b)

40. *Establishment of a Central Job Reporting System.* It is believed that the net effect of defendants' and respondents' actions have been to continue the exclusion of non-whites from employment in the sheet metal trade. Merely citing the defendants for contempt without changing their method of providing employment opportunities would not compensate the non-white community for the harm caused it or induce a greater participation by the non-white community in Local 28.

41. The central job reporting system would require that all sheet metal jobs be referred to Local 28 members on an equitable and non-discriminatory fashion.

42. To ensure that the establishment of a central job reporting system not be a punitive, but rather be a compensatory

measure, it is requested that such relief continue only until such time as the defendants have reached any remedial goal established by the court for non-white membership in Local 28.

(c)

43. *Central Job Reporting System Monitor.* The City requests the appointment, at the expense of the defendants, of an independent monitor to supervise, on a day-to-day basis, the operation of the central job reporting system. The evidence submitted on this motion demonstrates that Local 28 has violated this Court's orders concerning permit men and has controlled employment in the sheet metal trade to the detriment of non-whites. Neither the plaintiffs nor the Administrator are capable of providing the necessary detailed supervision that will be required to prevent violations of any rules implemented. After-the-fact inquiries are inadequate substitutes for daily compliance with the Order and Judgment and the RAAP & O. Consequently, it is necessary that the Court appoint an individual to monitor the central job reporting system daily in order to ensure that this Court's orders are enforced.

(d)

44. *Fines.* As detailed in Part V above, defendants and respondents have individually and jointly have violated this court's orders and caused non-whites to suffer a loss in employment opportunities and rights. To remedy this situation it is requested that the defendants and respondents be fined a total of \$182,500, that is \$100 per day for the period from July 1, 1977, the date the defendants first failed to meet an interim remedial goal until June 30, 1982. It is also requested that in order to coerce their future compliance, the defendants and the respondents be fined daily an amount deemed appropriate if they should continue to fail to meet this court's order after a specified date. The City and the State ask that such fines, as well as all other fines that may be imposed upon defendants and respondents not be paid to the Clerk of the Court, but rather be placed in a special fund. This fund would be monitored by the Administrator and would be utilized for the effectuation of all the relief requested herein.

(e)

45. *Injunction*: The collective bargaining provision described in Part (c) above, is in clear violation of the Order and Judgment's prohibition against acts which have "the purpose or the effect of discriminating in . . . advancement, compensation, terms, conditions or privileges of employment against any individual or class of individuals on the basis of race, color or national origin." (See Exhibit 1, Order and Judgment ¶s 1, 7 and 8). To prevent a continuing violation of the Order and Judgment it is requested that defendants be enjoined from enforcing the collective bargaining provision described in Part V(c).

(f)

46. *Special Training Fund*. The City and the State request that a special fund be created to be used for scholarships to train non-whites in New York City in areas, other than the sheet metal trades in which job opportunities are expanding.

(g)

47. *Revision of the Remedial Goal*. The 29% remedial goal was based upon the percentage of non-whites in the relevant labor force as evidenced by the 1970 census. As disclosed by the 1980 census the relevant non-white labor force has increased substantially. To more accurately reflect the position non-whites would have had in the sheet metal trade if defendants and respondents had not discriminated against them, it is requested that the remedial goal be increased to reflect the present relevant non-white labor force.

Costs and Attorney Fees

48. The City and the State also request that the costs and attorney fees incurred in the prosecution of this motion be taxed against the defendants and the respondents.

Conclusion

49. The evidence establishes that Local 28 of the Sheet Metal Workers' International Association, Local 28 Joint Apprenticeship Committee, Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. and the

individually-named contractors have consistently violated the decrees of this Court. In so doing they have discriminated against non-whites in violation of outstanding Court orders and in violation of Title VII of the Civil Rights Act of 1964.

WHEREFORE, to ensure that such violations cease and to compensate those non-whites who have been injured as a result of these violations, the City respectfully requests that this Court grant its motion, find Local 28, Local 28 JAC, the Contractors' Association and the individually named contractors to be in contempt of court, and award the relief requested herein and any other relief the Court may find just and proper.

/s/ CHARLES R. FOY

 CHARLES R. FOY
 Assistant Corporation Counsel

Sworn to before me this 16th
 day of April, 1982

/s/ NOEL ANNE FERRIS

 NOEL ANNE FERRIS
 Notary Public,
 State of New York
 No. 31-4732736
 Qualified in New York County
 Commission Expires March
 30, 1984

AFFIDAVIT OF SHEILA ABDUS-SALAAM
71 CIV. 2877
(HFW)

**United States District Court
Southern District of New York**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP
COMMITTEE . . . SHEET METAL AND AIR CONDITIONING
CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF
HUMAN RIGHTS,

Plaintiffs,

- against -

ABBOTT-SOMMER, *et. al.*,

Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SHEILA ABDUS-SALAAM, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of Robert Abrams, Attorney General of the State of New York, attorney for the New York State Division of Human Rights (the "Division" or "State"). I submit this affidavit in support of the State's and City's motion for an order citing for civil contempt defendants Local 28 of the Sheet Metal Workers' International Association ("Local 28"), Local 28 Joint Apprenticeship Committee ("JAC"), the Sheet Metal and Air Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association"), and one hundred twenty-one individually named Local 28 Contractors ("Respondents").

2. The State was named in the original action as a defendant by Local 28 and the JAC in third-and fourth-party complaints

because of administrative and judicial discrimination proceedings instituted by the New York State Attorney General in which they had previously been ordered to end racially discriminatory selection and admission practices under the supervision and direction of the State Division of Human Rights. *State Commission for Human Rights v. Farrell*, 43 Mis. 2d 958 (Sup. Ct. N.Y. Co. 1964)

3. The State adopts the allegations contained in that portion of the Affidavit of Charles R. Foy ("Foy Affidavit") which sets forth the background of this action. This affidavit focuses on defendants' and respondents' * violations of this Court's Order and Judgment, the RAAPO, the AMO and the Administrator's September 10, 1980 Memorandum and Order.

4. In violation of Order and Judgment ¶11 and RAAPO ¶2, defendants have failed to achieve any of the interim goals or the remedial goal for non-white membership in Local 28. The Order and Judgment directed Local 28 and the JAC to achieve a goal of 29% non-white representation in their combined membership by July 1, 1981. Subsequently, the RAAPO granted defendants an additional year to reach this ultimate goal and established the following interim goals:

July 1, 1976	5%
July 1, 1977	8%
July 1, 1978	11%
July 1, 1979	15%
July 1, 1980	19%
July 1, 1981	24%

5. Defendants' own membership records as reflected below demonstrate their complete failure to meet the remedial goals: **

Apr. 1, 1977	5.44%
Dec. 30, 1978	6.58%
July, 1980	8.5%
May 7, 1981	7.7%

* The respondents are parties to this contempt motion because of the alleged discriminatory provision of their collective bargaining agreement with Local 28 and to enable this court to grant full relief.

** Exhibits 6, 7, 8, and 11. "Exhibit" refers to the exhibits identified in the Foy Affidavit and submitted under separate cover.

6. The 29% non-white membership goal was based on New York City's non-white labor force as determined by the 1970 Census. Labor force statistics from the 1980 Census are not yet available. However, according to the 1980 Census, New York City's present non-white population is 45%, an increase of 11.3% from 1970. * (See, 1980 Census of Population and Housing: Advance Reports, U.S. Department of Commerce, Bureau of the Census)

7. In violation of Order and Judgment ¶21(h) and RAAPO ¶39, defendants have failed to undertake an effective general publicity campaign designed to inform the non-white community of non-discriminatory opportunities in Local 28 and the Apprenticeship Program. In violation of RAAPO ¶39 defendants failed to submit to the Administrator in April, 1977, a written plan for the implementation of a general publicity campaign. Since 1975 the only publicity campaigns undertaken by defendants have been limited to recruiting applicants for the journeyman and apprentice tests as required by Order and Judgment ¶21(h) and RAAPO ¶38.

8. The result of defendants' failure to conduct a general publicity campaign is dramatically illustrated by the small percentages of non-white membership set forth above in ¶5 and the union's extensive reliance on permit men^{***}, to fill job openings in Local 28's jurisdiction e.g., there were 79 permit men employed by Local 28 contractors between August, 1981 and

* The City and State have challenged the accuracy of the 1980 Census for New York. They maintain that non-whites and the poor were disproportionately under-counted by more than 600,000 in New York City alone and by more than 400,000 in the rest of New York State. *Carey v. Klutznick*, 508 F. Supp 420 (S.D.N.Y. 1980), *rev'd* 653 F. 2d 732 (2d Cir. 1981), *cert. denied* S. Ct. (March, 1982).

*** A permit or I.D. slip allows a member of a sister local or allied construction union such as plumbers or ironworkers to perform sheet metal work in Local 28's jurisdiction—New York City. Because of Local 28's use of permits to limit the size of its membership and thereby create substantial overtime opportunities for its members (over 96% of whom were white) and because of its discriminatory refusal to issue permits to non-white members of sister locals, Judge Werker held that the permit slip system "had the illegal effect of denying non-whites access to employment opportunities in the industry." 401 F. Supp. at 485.

February 1982; of these 79 permit men only five were non-white. (Exhibit 9)

9. In violation of Order and Judgment ¶¶1, 2, 7 and 21(g), Local 28, the Contractors' Association and the respondents entered into a collective bargaining agreement which provides, in relevant part:

During periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field.

This provision has a discriminatory impact on non-white union members who are disproportionately under age 52 because most of them have been admitted since 1975 and have entered as apprentices. Applicants for apprenticeship may not be older than 25 years of age except veterans of active military duty, who are permitted an additional year for each year of military service up to age 30, and non-white applicants for advanced apprentice standing who may be as "old" as 35. (RAAPO ¶22)

10. In violation of the Administrator's September 10, 1980 Order, defendants have failed to submit reports containing a detailed proposed two-year plan of action for reaching the 29% goal.*

11. The Order and Judgment and RAAPO require defendants to maintain records and submit regular reports in order to permit the Court, the Administrator and the plaintiffs to evaluate defendants' compliance with the Court's orders. Defendants have failed to comply with several key record keeping and reporting provisions of the Order and Judgment and the RAAPO.

(a) In violation of the Order and Judgment ¶21 and RAAPO ¶¶33(a)-(p), defendants have failed to submit quarterly reports with separate white and non-white data concerning union members, applicants for membership, and inquiries from persons seeking information about membership

* Local 28 and the JAC only partially complied with this order. On December 15, 1980, they filed reports with the Administrator detailing their efforts since 1975 to meet the RAAPO's interim goals. (Exhibits 11 and 12, respectively.)

with and job opportunities with or through the union. The last such report was received by plaintiffs in July, 1980.

(b) In violation of RAAPO ¶34(a), defendants have never submitted a listing, by race, of persons admitted to journeyman or apprentice status within five days of their admission.

(c) In violation of RAAPO ¶34 (b), defendants have failed to submit a bi-annual census of Local 28's membership, including the percentage of non-whites in each category. The last census was received by plaintiffs in May, 1981.

(d) In violation of RAAPO ¶35(a), defendants have failed to submit a listing of persons (including name, race, telephone number and address) who requested or filed an application for each apprentice test given since 1975. Such lists should be submitted within 7 days after the last date for filing applications. Plaintiffs received only the number of applicants by race in January, 1981.

(e) In violation of RAAPO ¶35(b), defendants have failed altogether to submit reports within 20 days after indenturing of an apprentice class containing the name and race of each person rejected as apprentice applicants with the reasons for their rejection, and the names of persons whose applications became inactive and the reasons therefor.

(f) In violation of RAAPO ¶35(d), defendants have failed to submit timely reports containing names of non-whites terminated from the Apprentice Program, including the reasons therefor, the efforts made to retain them, and their training and employment history while in the Apprentice Program. These reports are due 20 days after an apprentice is terminated. In March, 1981 and February 1982, months after they were due, plaintiffs received only two reports concerning apprentices terminated in late 1980, all of 1981 and January, 1982. Plaintiffs received no reports concerning apprentice terminations for 1979 and early 1980 or after February 1982.

12. In violation of AMO ¶(a), defendants have failed to submit updated quarterly employer lists indicating association and non-association companies and their specialties (e.g., roofing, ventilating or other). Plaintiffs received one such list in October, 1981.

13. In violation of AMO ¶(c), defendants have failed to submit quarterly and annual compilations of journeyman and apprentice hours of sheet metal work. Plaintiffs have never received this data.

14. In violation of AMO ¶(e), defendants have failed to submit a bi-monthly listing of all current construction involving sheet metal. Plaintiffs received one such listing in October 1981, after a special request was made by the City in September 1981. On February 25, 1982, the State requested that defendants submit to it missing data and reports described in ¶¶11-13 above. (Exhibit 13) Defendants have failed to comply with the State's request.

15. In violation of Order and Judgment ¶¶6 and 22(f) and RAAPO ¶17, defendants assigned sheet metal work to permit men without obtaining the Administrator's approval. (Exhibit 14, ¶9) All such unauthorized permit men were white.

16. On May 1, 1981 Edmund D'Elia, counsel for Local 28, sought the City's consent for permit men to work for General Sheet Metal. This request came only after the City protested the assignment of unauthorized permit men. (Exhibit 15) The City refused to consent to the permit men because Local 28 refused to provide the information necessary to evaluate the need for them. Despite the lack of authorization to do so, Local 28 issued permits for six men to work for General Sheet Metal. Again, all six unauthorized permit men were white. These six joined five other permit men (all white) already working for General Sheet Metal. (Exhibit 14, ¶9) At the same time, two other Local 28 contractors also had unauthorized permit men working for them. (*Id.*)

17. In violation of RAAPO ¶20(d)(ii), the JAC has failed to "take all necessary steps to seek out and apply for governmental manpower training funds."* No funding proposals were ever

* The JAC admits its only funding efforts were as follows:

- a. Actively participated in the Building Trades Councils Committee established to obtain government funding.
- b. Met with Sal Crivelli of the U.S. Department of Labor to explore avenues of funding.

Footnote continued on following page

submitted and no funding was ever obtained. (Exhibit 12 and Exhibit 16).

18. In violation of RAAPO ¶19(b), the JAC has failed to submit its recommendation for the number of apprentices to be indentured in each apprentice class at least 90 days before the indenturing of the class. The required recommendation is to be accompanied by a report stating the basis for the number recommended. It is the JAC's practice to indenture the class before informing plaintiffs and the Administrator of the exact number of apprentices indentured. The basis for this number is never explained. This practice had made intelligent evaluation of various manpower issues and the JAC's recommendation extremely difficult, if not impossible, and has nullified ¶19(b)'s provision allowing the plaintiffs 15 days to object to the recommendations.*

19. In violation of the Administrator's order dated September 10, 1980, defendants have failed to submit reports setting forth, *inter alia*, a "detailed proposed plan of action for the following two years" (1981 to July 1982) to reach the 29% goal. (emphasis added) (Exhibit 5) While both the JAC and Local 28 filed reports with the Administrator, neither report contained a "detailed proposed plan of action." Both defendants stated they would continue their past efforts and rely upon an improvement in the economy and a decrease in unemployment to improve the status of non-whites in the sheet metal trade. (See, Exhibits 11 and 12).*

Footnote continued from previous page

- c. Communicated with the manpower committees of Congress to obtain information as to what future legislation is contemplated.
- d. Appointed Thomas Carlough, formerly Director of Local 400 JAC, to actively pursue funding possibilities.

* The size of the apprenticeship class is critical because the Apprenticeship Program is the most effective way of bringing non-whites into the union.

* On April 15, 1982 at 4 p.m., as these papers were being typed, Local 28 hand-delivered to the State some data including, among other things, the most recent census (April, 1982) of the union membership which appears to show that the non-white membership is 11%—still 18 percentage points below the 29% remedial goal.

WHEREFORE, the State requests this Court to hold defendants and respondents in civil contempt and to grant the following relief:

a) require defendants to pay compensatory fines in the amount of \$182,500, calculated at the rate of \$100 per day from July 1, 1977 (when defendants failed to meet the 8% interim goal) for non-white union membership through June 30, 1982 (when defendants will inevitably fail to meet the ultimate remedial goal of 29%);

b) require defendants to pay coercive fines in such amounts as this Court deems appropriate to ensure prompt compliance with this Court's orders;

c) require the respondent contractors to notify Local 28 of each Local 28 member hired, and to state for each such hire: name, address, phone number, race, contractor's name, and length of job for which hired; and to require the union to report quarterly to plaintiffs and the Court on all such new hires. Such reporting will permit the plaintiffs and the Court to monitor employment opportunities in the sheet metal industry and ensure that those opportunities are equally available to non-whites;

d) require the defendants to conduct an effective general publicity and outreach campaign designed to dispel the union's discriminatory image and to inform non-whites of non-discriminatory opportunities in the sheet metal trade and industry;

e) enjoin enforcement of the age requirement in the present collective bargaining agreement because of its discriminatory impact on non-whites;

f) increase the non-white union membership goal to reflect the increased non-white minority labor pool;

g) award the State its attorneys fees and costs; and

h) such other and further relief as this Court deems appropriate to ensure prompt compliance with its orders and to ensure non-whites equal employment opportunities in the sheet metal trade and industry.

/s/ SHEILA ABDUS-SALAAM
.....
SHEILA ABDUS-SALAAM

Sworn to before me this
16 day of April, 1982

.../s/DEBORAH BACHRACH.....
Assistant Attorney General

71 Civ. 2877 (HFW)
REPLY MEMORANDUM
OF DEFENDANTS IN
SUPPORT OF THEIR
MOTION TO TERMINATE
OPERATION OF THE JUDGMENT

**United States District Court
Southern District of New York**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

- against -

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, *et al.*,

Defendants.

Introduction

On June 3, 1982, plaintiffs City of New York ("City") and State of New York, Attorney General's Office ("State") responded to the motion by defendants Local 28 of the Sheet Metal Workers International Association ("Local 28"), the Local 28 Joint Apprenticeship Committee ("JAC"), and the Sheet Metal and Air Conditioning Contractors Association of New York City ("Contractors Association") to terminate the Court's judgment in this action.

Some of the issues raised by plaintiffs have previously been raised by them before the Administrator, pursuant to the mechanisms and procedures established by the Court. The Administrator considered these issues; the Administrator did not rule in favor of the plaintiffs; the plaintiffs did not pursue their right of appeal, as provided for in the Revised Affirmative Action Program & Order

A-480

Effective Date	Number of Whites	Number of Non-Whites	Total Membership	Non-White % of Membership
7/1/74	3,553	117	3,670	3.19%
1/1/76	3,268	292	3,560	8.2%
7/1/76	3,115	281	3,396	8.2%
4/1/77	2,514	165	2,679	6.1%
6/30/78	2,419	266	2,685	9.9%
12/30/78	2,384	287	2,671	10.7%
3/31/79	2,353	297	2,650	11.2%
7/80	1,871	292	2,163	13.5%
5/7/81	2,040	289	2,329	12.4%
4/12/82	2,105	369	2,474	14.9%

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Utilizing plaintiffs' proposal, as modified by the legal requirements as ordered by the Court, 12 FEP Cases 742, 751, plaintiffs would achieve only about half of the nonwhite membership goal. The result of such a practice, in reality, would have had the unintended result of increasing total membership while decreasing job opportunities for members of all races. The more positive--and far more remedial--practice has been that employed by defendants: to increase total nonwhite membership 209 percent, while maintaining a reasonable rate of job opportunities for sheet metal workers of all races. Plaintiffs' proposal would have provided increased membership and a gross dilution of employment--a hollow victory indeed for nonwhites.

MEMORANDUM IN REPLY
TO DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR A CONTEMPT ORDER AND IN SUPPORT OF
DEFENDANTS' MOTION TO TERMINATE
THE JUDGMENT ORDER

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

— against —

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, *et al.*,

Defendants.

ROBERT ABRAMS
Attorney General of the
State of New York
Two World Trade Center
New York, New York 10047
(212) 488-7510
Attorney for the New York
State Division of Human Rights

DEBORAH BACHRACH
Bureau Chief, Civil Rights Bureau
Assistant Attorney General

SHEILA ABDUS-SALAAM
NOLAN A. BOWIE
Assistant Attorneys General

Of Counsel

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel
Attorney for the City of New York
100 Church Street
New York, New York 10007
(212) 566-2309/2191

JUDITH A. LEVITT
CHARLES R. FOY
MERYL R. KAYNARD
Assistant Corporation
Counsels

Of Counsel

71 Civ. 2877
(HFW)

CHART D

Year	Avg. No. of Apprentices	Percentage Unemployed	Avg. Hrs. Per Week	Avg. Weeks Worked
1965	230	5%	35	46
1966	165	5%	35	46
1967	110	5%	35	46
1968	180	5%	35	46
1969	360	3%	35	41
1970	500	3%	35	46
1971	540	3%	35	46
1972	575	6%	35	36
1973	450	7%	35	46
1974	340	20%	32.5	32.5
1975	269	40%	30	44
1976	134	-- data not provided by defendants --		

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CHART D
(continued)

Year	Avg. No. of Apprentices	Percentage Unemployed	Avg. Hrs. Per Week	Avg. Weeks Worked
1977*	73	6.7%	32***	39
1978*	108	4%	34	52
1979	111	3.6%	33	47
1980	125	.059%	33	48
1981*	199	0	33	46
1982**	291	0	34	17

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* Excludes data unavailable for the following months/years: January, February and September, 1977 June 1978 April 1981

** All 1982 data is through April, 1982 only.

*** Average hours per week for 1977 - 1982 excludes hours worked by apprentices during the first month of indenture.

OPPOSITION BRIEF

JUL 22 1985

IN THE
Supreme Court of the United States
October Term, 1984

LOCAL 638 LOCAL 28 OF THE SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

against

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
THE CITY OF NEW YORK, and NEW YORK STATE
DIVISION OF HUMAN RIGHTS,

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

FREDERICK A. O. SCHWARZ, JR.*

Corporation Counsel of the
City of New York

*Attorney for Respondent
the City of New York*

100 Church Street
New York, New York 10007

LORNA B. GOODMAN

LAURA J. BLANKFEIN

LIN B. SABERSKI

Assistant Corporation Counsel

ROBERT ABRAMS

Attorney General

of the State of New York

Attorney for Respondent

New York State Division

of Human Rights

Suite 45-08

Two World Trade Center

New York, New York 10047

(212) 488-7510

ROBERT HERMANN

Solicitor General

O. PETER SHERWOOD

Deputy Solicitor General

ROSEMARIE RHODES

LAWRENCE S. KAHN*

ALAN D. AVILES

MARTHA J. OLSON

Assistant Attorneys General

**Counsel of Record*

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No. 84-1656

IN THE

Supreme Court of the United States

October Term, 1984

LOCAL 638 . . . , LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

against

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Preliminary Statement

Petitioners are before this Court having been found guilty of a long and ignominious history of intentional racial discrimination and of repeated defiance of judicially supervised efforts to effect compliance with local, state and federal fair employment laws. For over twenty years, in more than twenty-five orders or opinions, the state and federal courts have sought to force these petitioners into

compliance with established law.* *See, e.g.*, Pet. 2, n.2; A-i-ii.** The Second Circuit now has rejected, for the third time, petitioners' efforts to evade compliance with federal court orders entered to redress their discriminatory practices, and has affirmed the lower court's judgments holding defendants in contempt of these remedial orders. Under the guise of appealing the contempt judgments, petitioners come to this Court principally to obtain review of the underlying remedial court orders, for which the time to seek review has long since expired. Because this petition is untimely as to virtually all of the rulings being challenged and because the rulings below are plainly correct, the petition should be denied.

A. Litigation History Prior to the Contempt Proceedings

In 1971, the United States Department of Justice, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, filed suit against petitioners to enjoin a pattern and practice of discrimination against black and Spanish surnamed individuals ("non-whites") who sought

* Petitioners were first found to have intentionally discriminated against minorities in 1964, in a proceeding brought under the New York Human Rights Law. *State Comm'n For Human Rights v. Farrell*, 43 Misc. 2d 958 (Sup. Ct. N.Y. Co. 1964). A-411. Thereafter, the trial judge repeatedly castigated Local 28 for foot-dragging in its integration efforts and found it necessary to issue several orders enforcing the original judgment. *State Comm'n For Human Rights v. Farrell*, 47 Misc. 2d 244 (Sup. Ct. N.Y. Co. 1965); *State Comm'n For Human Rights v. Farrell*, 47 Misc. 2d 799 (Sup. Ct. N.Y. Co. 1965); *State Comm'n For Human Rights v. Farrell*, 52 Misc. 2d 936 (Sup. Ct. N.Y. Co.), *aff'd*, 27 A.D.2d 327 (1st Dept.), *aff'd*, 19 N.Y.2d 974 (1967). Local 28 continued to resist court orders following commencement in 1971 of the federal action. *See, e.g.*, A-220.

** References to the Petition for Writ of Certiorari are cited as "Pet. —". References to the Appendix to the Petition are cited as "A- —". References to the Respondents' Brief in Opposition to the Petition for Writ of Certiorari are cited as "Opp. —".

membership in Local 28 and training and job opportunities in the sheet metal trade in New York City. Following a trial in 1975, the district court found that petitioners had intentionally discriminated against non-whites by administering discriminatory entrance examinations; excluding persons who lacked a high school diploma; offering cram courses to the sons and nephews of union members but not to minority applicants; refusing to accept blowpipe sheet metal workers for membership because most such workers were non-white; consistently discriminating in favor of white applicants seeking to transfer into Local 28 from sister locals; refusing to administer journeyman examinations out of a fear that minority candidates would do well, and instead issuing work permits to non-members on a discriminatory basis; and failing to organize non-union sheet metal shops owned by or employing non-whites. A-330-50.*

Based upon these findings, the court entered an Order and Judgment ("O&J") that enjoined petitioners from all future violations of Title VII and ordered petitioners to achieve, by July 1, 1981, a remedial end-goal of 29% non-white membership in Local 28. A-305, 354. This goal was based on the relevant non-white labor pool in New York City. A-300, 305, 353-54. The court also ordered petitioners to eliminate the diploma requirement for the apprenticeship program, to offer non-discriminatory entrance exams for journeymen and apprentices, and to allow transfers and issue temporary work permits on a non-discriminatory

* The court further noted that, during the pendency of both the state and federal proceedings, Local 28 and the JAC had repeatedly flouted the state court's mandate to "create 'a truly non-discriminatory union,'" and had obeyed the federal court's interim orders only under threat of contempt citations. A-352.

basis. A-354-56, 308-10, 303. Petitioners were required to engage in extensive recruitment and publicity campaigns in minority neighborhoods in order to dispel Local 28's reputation for discrimination and to ensure a broad applicant pool for these tests and transfers, A-355, 312, and to maintain records regarding applications, requests for transfer, inquiries about permit slips and hiring. A-355, 310-11. The court appointed an Administrator to supervise compliance with the court's decree. A-355, 305-07.

On appeal, the Second Circuit affirmed, noting that there was ample evidence that petitioners "consistently and egregiously violated Title VII." A-212. Indeed, petitioners "[did] not even make a serious effort to contest the finding of Title VII violations" in this initial appeal. A-215. The court upheld the 29% goal as a temporary remedy, distinguishing it from "a quota used to bump incumbents or hinder promotion of present members of the work force." A-221, 222. It also upheld the requirement that entrance examinations be validated and ruled that the testing schedules and recruitment requirements imposed by the district court were appropriate exercises of the district court's discretion. A-222. The court modified the relief by eliminating any provision that "might be interpreted to permit white-minority ratios for the apprenticeship program after the adoption of valid, job-related entrance tests." A-225. It concluded that the appointment of an administrator with broad powers was "clearly appropriate," given petitioners' failure to change their membership practices pursuant to the earlier New York court orders and the district court's rulings in this case. A-220.

Petitioners did not seek review in this Court from the Second Circuit's judgment, which finally determined all issues in the action.

On January 19, 1977, following the Second Circuit's affirmance, the district court issued a revised affirmative action program and order ("RAAPO"). A-182. Among other things, RAAPO granted petitioners an additional year in which to meet the 29% membership goal. The court ordered petitioners to insure that regular and substantial progress was made every year in admitting non-whites. Additional modifications were made to insure that, during a time of widespread unemployment in the industry, apprentices shared equitably in available employment opportunities in the industry. A-183-84. The court therefore ordered the JAC to take all reasonable steps to insure that apprentices receive adequate employment opportunities and to indenture two classes of apprentices each year, the size of each class to be determined by the JAC, subject to review by the Administrator. A-192-93.

Petitioners appealed six provisions of RAAPO, including the apprenticeship indenture requirement and the 29% goal, but the Second Circuit affirmed. A-160, 165-66. Once again neither Local 28 nor the JAC sought certiorari from this Court.

B. The Contempt Proceedings

In 1982, it became clear to the respondents that Local 28 would not achieve the 29% goal by the July 1, 1982 date required under the O&J. Because this result was a consequence of Local 28's failure to comply with several sub-

stantive provisions of the O&J and RAAPO, respondents moved for an order holding petitioners in contempt. Petitioners cross-moved for an order terminating the O&J and RAAPO.

Following a hearing, the district court found that petitioners had "impeded the entry of non-whites into Local 28 in contravention of the prior orders of this court." A-149, 150.* Judge Werker held petitioners in contempt for violating the O&J and RAAPO by a) underutilizing the apprentice program to the detriment of non-whites; b) failing to undertake, as required by RAAPO, a general publicity campaign intended to dispel petitioners' reputation for discrimination; c) failing to maintain and submit records and reports; d) issuing work permits without prior authorization of the Administrator; and e) entering into an agreement amending their collective bargaining contract by adding a provision that discriminates against Local 28's non-white members by protecting members aged fifty-two or over during periods of unemployment (the "older workers' provision"). The cumulative effect of these contemptuous acts, the district court ruled, was that petitioners failed even to approach the 29% goal.** A-155-56.

* Petitioners' assertion, at Pet. 7, that they had achieved a non-white membership in Local 28 of 14.9% by April 1977, was rejected by both the district court and the Second Circuit. A-9. Petitioners' own April 1982 census showed its non-white membership to be only 10.8%. Similarly, petitioners' statement that 45% of their apprentice classes are made up of non-whites, Pet. 7, is misleading in that only since January 1981 have petitioners indentured apprenticeship classes consisting of 45% non-whites. A-37.

** Although Local 28's total non-white journeymen and apprentice membership was then only 10.8%, more than 18 percentage points below the ultimate goal petitioners had been ordered to reach by July 1, 1982, the district court did not base its finding of contempt upon petitioners' failure to reach the goal. A-155.

The primary basis for the contempt holding was the district court's finding that petitioners had deliberately underutilized the apprenticeship program in order to limit non-white membership and employment opportunities. This finding rested on evidence that petitioners trained substantially fewer apprentices after entry of the O&J than prior to its issuance. The court found that the underutilization of the apprenticeship program was not the result of a downturn in the economy. To the contrary, the average number of hours and weeks worked per year by its journeymen members steadily increased from 1975 to 1981. A-16, 151. In fact, by 1981, employment opportunities so exceeded the available supply of Local 28 journeymen that Local 28 was compelled to issue an extraordinary number of work permits to non-member sheet metal workers, most of whom were white. A-16. Thus, the court concluded that during the years after entry of the O&J, Local 28 deliberately shifted employment opportunities from apprentices to its predominantly white, incumbent journeymen.* The extent of that shift was demonstrated by the increase in the ratio of journeymen to apprentices from 7:1 before the O&J was entered to 18:1 by 1981, well above the industry standard of 4:1. A-16.

The court's finding that petitioners were also in contempt for issuing permits without the Administrator's approval was based upon evidence that Local 28 issued thirteen unauthorized permits between March and June 1981. Of the thirteen unauthorized permit men, only one was non-white. These contemptuous acts were particularly signifi-

* Petitioners erroneously assert, at Pet. 7, that the Administrator approved the size of each of more than 60 classes of apprentices. What petitioners mistakenly refer to are the reports ultimately submitted to the Administrator informing him of the number of apprentices in the JAC program. A-42 n.3.

cant given the district court's earlier finding, after trial, that Local 28 had used the permit system to restrict the size of its membership with the illegal effect of denying non-whites access to employment opportunities in the sheet metal industry. A-345-46.

Petitioners were also held in contempt for violating the provisions of the O&J and RAAPO requiring Local 28 and the JAC to devise and implement a written plan for an effective general publicity campaign designed to dispel their reputation for discrimination in non-white communities. A-152-53. It was undisputed that the general publicity plan required by the O&J and RAAPO was never formulated, much less implemented. Finally, petitioners were held in contempt for failing, since 1976, to comply with the reporting requirements of the O&J and RAAPO and with the Administrator's request for information relevant to the implementation of RAAPO. A-154-55.

The district court denied petitioners' cross-motion to terminate the O&J and RAAPO, finding that its purposes had not been achieved and that it had not caused petitioners unexpected or undue hardship. A-157.

On April 11, 1983, the City brought a proceeding against Local 28 and the JAC for additional violations of the O&J and RAAPO. After a hearing, the Administrator found that Local 28 and the JAC had again acted contemptuously by failing to provide data required by the O&J and RAAPO, failing to send copies of the O&J and RAAPO to all new contractors in the manner ordered by the Administrator, and failing to provide accurate reports of hours worked by apprentices. A-127, 128-38.

The district court adopted the Administrator's findings and again held Local 28 and the JAC in contempt. A-125.

C. The Fund Order

To remedy petitioners' past noncompliance, the district court imposed a fine of \$150,000 for the first series of contemptuous acts and additional fines of \$.02 per hour for each journeyman and apprentice hour worked for the second series of contemptuous acts. A-113, 114. These fines were to be placed in an interest-bearing Local 28 Employment, Training, Education and Recruitment Fund (the "Fund") to be used, among other things, to: provide financial assistance to contractors otherwise unable to meet a 4:1 journeyman-to-apprentice ratio, provide incentive or matching funds to attract additional funding from governmental or private job training programs, establish a tutorial program for non-white first year apprentices, and create summer or part-time sheet metal jobs for minority youths who have had vocational training. A-116-18. The Fund will "remain in existence until the [new non-white membership] goal set forth in the Amended Affirmative Action Program and Order ("AAAPO") . . . is achieved and until the Court determines that it is no longer necessary." A-114.

D. AAAPPO

Because the remedial purposes of RAAPO had not been achieved, the district court, on November 4, 1983, entered AAAPPO to replace RAAPO. A-53, 111. AAAPPO modified RAAPO in a number of respects. It modified the non-white membership goal from 29% to 29.23% to reflect Local 28's expanded jurisdiction (due to merger of several unions into Local 28) and a population change in the relevant labor pool. A-54, 122-23. It extended the deadline for meeting the goal until August 31, 1987. A-55. It also required that

one non-white applicant be indentured into the apprenticeship program for each white applicant indentured and that, unless waived by plaintiffs, the JACs assign each Local 28 contractor one apprentice for every four journeymen. A-57.

E. The Appeal to the Second Circuit

Local 28 and the JAC appealed to the Second Circuit from the district court's contempt orders, its Fund order and its order adopting AAPO. They did not appeal from the denial of their cross motion to terminate the O&J and RAPO.

The Second Circuit affirmed all of the district court's findings of contempt against Local 28 and the JAC, except the finding based on the older workers' provision. It also affirmed the contempt remedies and establishment of the Fund.

With respect to the first contempt proceeding, the Second Circuit held that the evidence "solidly supports Judge Werker's conclusion that defendants underutilized the apprenticeship program" A-17. The court concluded, "[p]articularly in light of the determined resistance by Local 28 to all efforts to integrate its membership, . . . the combination of violations found by Judge Werker . . . amply demonstrates the union's foot-dragging egregious noncompliance . . . and adequately supports his findings of civil contempt against both Local 28 and the JAC." A-21.

With respect to the second contempt proceeding, the court held that the district court's determination was supported by "clear and convincing evidence which showed

that defendants had not been reasonably diligent in attempting to comply with the orders of the court and the Administrator." A-22.

The court concluded that the establishment of the Fund was an appropriate contempt remedy. The district court had aimed the relief at the apprenticeship program, where it would be most effective, and the Fund would compensate those who had suffered the most from defendants' contemptuous conduct. A-26.

The court affirmed AAPO with two modifications: it set aside the requirement that one non-white apprentice be indentured for every white, concluding that the ratio was unnecessary in order to assure progress toward the goal, and it modified AAPO to permit the use of validated selection procedures before the 29.23% membership goal is reached.

Finally, the court reaffirmed the 29.23% membership goal, finding that it met the circuit's two-pronged test for the validity of a temporary, race-conscious affirmative action remedy. First, as the court had twice before recognized, the remedy was designed to correct a long, continuing and egregious pattern of race discrimination. Second, the remedy "will not unnecessarily trammel the rights of any readily ascertainable group of non-minority individuals." A-32.

It is from this judgment of the Second Circuit that petitioners seek review.

ARGUMENT

I.

The Petition Is Untimely As To Virtually All Of The Questions Presented.

Petitioners' application for certiorari is untimely as to almost all of the rulings for which review is sought. First, petitioners seek to challenge the district court's original findings of intentional race discrimination, which were made in 1975 and affirmed on appeal in 1976. A-211-15. Petitioners declined to seek certiorari after the Second Circuit's affirmance. This Court's rules, Sup. Ct. R. 20, and 28 U.S.C. § 2101, require that certiorari be sought no later than ninety days after entry of the judgment to be reviewed. Petitioners' challenge to these findings of intentional race discrimination thus comes more than eight years too late. *See Parker v. Illinois*, 333 U.S. 571, 576 (1948).*

* Petitioners claim no new facts or changed circumstances that might make appropriate a belated review of the findings of liability. Their argument that *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), requires a redetermination was made and rightfully rejected by the Second Circuit in 1977 in an opinion from which the petitioners also did not seek review. Moreover, the findings of discrimination were consistent with *Hazelwood*. Petitioners' liability was based not on statistics alone but primarily on a series of intentionally discriminatory practices against minorities. Opp. 2. *See also* A-333 n.12.

Furthermore, certiorari is inappropriate because petitioners seek to relitigate factual findings concurred in by both the district and appellate courts. This Court has often stated that it is reluctant to disturb findings of fact concurred in by two lower courts. *E.g.*, *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *see Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, — U.S. —, 104 S. Ct. 2948, 2959 n.15 (1984).

Petitioners' challenges to the powers of the Administrator and to the 29% goal are likewise untimely.* The 1975 O&J created the office of Administrator, giving it supervisory powers over petitioners' implementation of the court's order. The O&J also established the 29% goal. In 1976, the Second Circuit affirmed both the appointment of the Administrator and the 29% goal. A-220. As noted above, petitioners did not seek certiorari from the Second Circuit's judgment.

Following entry of RAAPO in 1977, petitioners appealed a provision granting certain oversight powers to the Administrator, A-165, and again challenged the goal, claiming that it constituted a quota forbidden by Title VII and the Constitution, and that it was improperly calculated under *Hazelwood School District v. United States*, 433 U.S. 299 (1977). The Second Circuit upheld the Administrator's powers, A-165-66, and reaffirmed the goal. A-167-68. Again, petitioners did not seek certiorari. Because petitioners' challenge to the Administrator's powers and to the 29% goal seeks review of the Second Circuit's 1976 and 1977 judgments, their challenge is untimely under 28 U.S.C. 2101 and Sup. Ct. R. 20. *See Parker v. Illinois*, 333 U.S. at 576.

Petitioners renewed their twice failed challenges to the powers of the Administrator and the 29% goal in 1982 when they sought to terminate the O&J and RAAPO. A-150-57. The district court denied this motion, stating that "[t]he

* The adjustment made to the goal in August 1983 by the district court, A-119, and affirmed by the Second Circuit, A-33, was so minor that a challenge to the 29.23% goal is in reality a challenge to the underlying 29% goal itself. As the district court noted, "[t]he new goal of 29.23% essentially is the same as the goal set in 1975." A-123.

purposes of RAAPO have not been achieved and it has not caused the defendants any unexpected or undue hardship." A-157. Petitioners did not, simply by moving to terminate the goal, revive their right to seek review of the court's earlier judgments. Moreover, because no appeal was taken from the district court's order denying their motion, A-12, the issues raised therein, such as the alleged impracticality of the goal, cannot be brought before this Court. As this Court has stated, "the judgment . . . was final and appealable. Since [it was not appealed] we cannot now consider whether the judgment was in error." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 n.5 (1980); *accord Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 432 (1976) (refusing to consider, on certiorari from denial of a motion to modify or terminate certain provisions of a 1970 decree, the validity of the district court's original judgment since it had not been appealed).*

* Petitioners' argument that the appointment of an administrator interferes with Local 28's right of self-government must likewise fail for the simple reason that the principle of union self-governance has never been allowed to override requirements imposed by the labor laws or any other law. *See Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 471 (1968) (the freedom allowed unions to conduct their own elections is reserved for those elections which conform to the democratic principles written into 29 U.S.C. § 401); *Myers v. Gilman Paper Co.*, 544 F.2d 837, 858 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977) (collectively bargained agreements may be overridden if they violate Title VII). In any event, the powers granted the Administrator did not interfere in any way with Local 28's self-governance. Local 28 retains complete autonomy regarding its own elections and the collective bargaining process. To the extent the Administrator monitors admission to union membership or employment, such monitoring is fully justified by Local 28's intransigence in refusing to obey previous court orders. Courts have often upheld the appointments of administrators or special masters to oversee the implementation of judgments in complex cases where the defendants have failed to comply with court orders requiring changes in existing practices and conditions. *See New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 962-63 (2d Cir. 1982), *cert. denied*, 104 S. Ct. 277 (1983); *Ruiz v. Estelle*, 679 F.2d 1115,

(footnote continued on next page)

Contrary to petitioners' argument, at Pet. 12 n.7, "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948); *accord Oriel v. Russell*, 278 U.S. 358 (1929); *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628, 637 (3d Cir. 1982) (*en banc*), *cert. denied*, 104 S. Ct. 1315 (1984); *Florida Steel Corp. v. N.L.R.B.*, 648 F.2d 233, 238 n.10 (5th Cir. 1981).* As the Third Circuit stated,

There are strong policy reasons for limiting review, even in post-final judgment contempt proceedings, to matters which do not invalidate the underlying order. If a civil contemnor could raise on appeal any substantive defense to the underlying order by disobeying it, the time limits specified in [the Federal rules] would easily be set to naught [,] . . . present[ing] the prospect of perpetual relitigation, and thus destroy[ing] the finality of judgments of both appellate and trial courts.

Halderman v. Pennhurst State School & Hospital, 673 F.2d at 637.

1160-63 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Gary W. v. State of Louisiana*, 601 F.2d 240, 244-45 (5th Cir. 1979). Here, Local 28's record of foot-dragging and non-compliance dates back almost twenty years, *see ante* at 1-2. The powers granted the Administrator here do not exceed those granted administrators appointed in other complex civil rights cases. *See, e.g., Ruiz v. Estelle*, 679 F.2d at 1160-63. The Administrator's term has been extended simply because of Local 28's refusal to comply with the lower courts' orders in this case.

* The cases cited by petitioners at Pet. 12 n.7 are inapposite, as each of those cases dealt with contempt orders imposed for violation of a temporary restraining order, a preliminary injunction or a discovery order, and not for contempt stemming from a violation of a final judgment imposed several years earlier.

In the present case, petitioners' arguments were long ago rejected by two judgments of the Second Circuit. Petitioners should not be allowed to relitigate these same claims before this Court at this late date under the guise of appealing the contempt judgment.

II.

The Contempt Remedy Affirmed Below Is Firmly Rooted In Well-Settled Principles Of Contempt Law.

Petitioners urge that certiorari be granted "to restate the principles of civil contempt." Pet. 17. They fail, however, to ground their petition on any of the traditional criteria that govern review on certiorari. See Sup. Ct. R. 17.1. Petitioners' claim is simply that in this case the lower courts misapplied established law. Yet, as the record demonstrates, the decisions of the courts below were plainly correct. A-25-26.

This Court has long held that a finding of civil contempt allows the imposition of remedial sanctions "for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers of America*, 330 U.S. 258, 303-4 (1947); see *Hutto v. Finney*, 437 U.S. 678, 691 (1978); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 443-44 (1911).

The compensatory nexus between the injury inflicted by the defendants' contumacious conduct and the remedies imposed is manifest. The district court concluded, and the

Court of Appeals agreed, that petitioners' contumacious conduct "impeded the entry of non-whites into Local 28 in contravention of the [district court's] prior orders" and "that the collective effect of these violations has been to thwart the achievement of the 29% goal of non-white membership in Local 28 established by the court in 1975." A-26, 150, 155. Undeniably, this obstruction of the remedial relief previously ordered by the district court—particularly the deliberate underutilization of the apprentice program by Local 28 and the JAC—injured the class of non-whites interested in becoming Local 28 sheet metal workers who are the intended beneficiaries of the O&J and RAAPO. By deliberately shifting employment opportunities to journeymen, virtually all of whom were white, rather than training new apprentices on a non-discriminatory basis, petitioners ensured that they would achieve only minimal progress in increasing the proportion of minorities in their membership. Although those thus denied the intended remedial benefit of the district court's orders may not all have been individually identifiable, the injury inflicted is real and substantial: but for petitioners' contemptuous conduct, there would have been more non-white apprentices and further progress toward attainment of the 29% remedial goal.

The Fund order directs that the compensatory contempt fines assessed against petitioners be used to attract additional qualified non-whites into the apprentice program and to assist them in completing the program by establishing counseling and tutorial services, by providing financial assistance to any non-white apprentice unemployed or experiencing financial hardship during the first apprentice term, and by funding part-time and summer jobs for non-

white youths in vocational programs in the sheet metal or allied trades. Further, to expand the training and employment opportunities for apprentices, especially minority apprentices, part of the fines are to be used as incentive or matching funds to attract governmental or private job training programs, and to provide financial assistance to employers who otherwise cannot afford to hire an additional apprentice to meet the 4:1 ratio required by AAAPPO. A-113-18. Thus, as the Court of Appeals correctly held, the Fund is "specifically intended to compensate those who had suffered most from [petitioners'] contemptuous conduct," and it does so "by improving the route [non-whites] most frequently travel in seeking union membership." A-26.

Moreover, because the Fund order requires petitioners to make additional periodic payments into the Fund until they have fully complied with the O&J and AAAPPO by eradicating the effects of their persistent and intentional exclusion of non-whites, the Fund order serves a coercive function as well. Under the terms of RAAPPO, full compliance should have been achieved by July 1, 1982. Yet, in April 1982, after 7 years under remedial court orders, only 10.8% of petitioners' members were non-white. In a classic exercise of coercive contempt powers, the Fund order gives the petitioners an opportunity to purge themselves of contempt and to recover excess monies from the Fund upon achieving, however belatedly, full compliance with the O&J and AAAPPO. See *Penfield Co. v. Securities & Exchange Commission*, 330 U.S. 585, 590 (1947).

Petitioners insist that this Court conduct a highly individualized factual analysis to determine whether, as they

assert, there is an imperfect match between petitioners' contumacious acts and the Fund designed to compensate for those acts. Such fact-specific assertions, addressed to a voluminous factual record that was carefully considered by the Court of Appeals, do not warrant this Court's review. See *National Collegiate Athletic Association v. Board of Regents*, — U.S. —, 104 S. Ct. 2948, 2959 n.15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). In any event, this Court recognized long ago that a perfect match between the injury inflicted and the compensatory contempt remedy fashioned is not always possible, and thus is not an essential ingredient of such a remedy. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (noting that a compensatory civil contempt fine must be "measured in some degree" by the injury caused by the disobedient act). By assisting non-whites' entry into and completion of the apprentice program and by expanding training and employment opportunities for non-white apprentices, the Fund order will accelerate the integration of Local 28, remedying to a large degree the injuries inflicted by petitioners' obstruction of the prior remedial orders.

Petitioners' argument, that even narrowly fashioned remedial contempt sanctions are unavailable to redress clear injury solely because the injured victims are not individually identifiable, would, if accepted, as this Court has remarked in a different but related context, "operate to prevent accountability for persistent contumacy." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). Such an inflexible bar would enable a union or employer to violate with impunity a judgment enjoining discriminatory practices, provided that in continuing to pursue discriminatory practices, the defendant ensured that individual

victims could not be identified (i.e., by continuing a discriminatory reputation, thereby deterring minority applications, or by failing to retain applications). Surely, as the Court of Appeals implicitly recognized, "the force and vitality of judicial decrees derive from more robust sanctions." *Id.* at 191.

III.

The Petition Should Be Denied Because The Court Below Correctly Concluded That This Court's Holding In *Firefighters v. Stotts* Was Not Controlling And Because This Case Provides An Inappropriate Vehicle For Evaluating Race-Conscious Remedies Under Title VII.

Petitioners argue that certiorari should be granted because the court below, and other lower courts, have failed to follow what petitioners characterize as this Court's holding in *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S. Ct. 2576 (1984). In the alternative, petitioners argue that, if *Stotts* does not preclude race-conscious remedies under the facts presented, the Court should grant certiorari to determine whether race-conscious remedies that benefit unidentifiable victims can ever be awarded in a Title VII case. Not only do petitioners mischaracterize *Stotts*, they ignore this Court's previous holdings and the unanimous conclusion of the courts of appeals that affirmative race-conscious remedies can be appropriate and necessary means of eliminating employment discrimination. Moreover, petitioners overlook the unique facts of this case, their untimeliness in challenging the 29% hiring goal, and the complicating factor of the district court's contempt powers pursuant to which the Fund was established.

Petitioners contend that *Stotts* held that section 706(g) of Title VII prohibits all race-conscious remedies except those designed to compensate identifiable victims of discrimination. To the contrary, *Stotts* held only that "the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." 104 S. Ct. at 2585 (footnotes omitted). The Court concluded that section 703(h) of Title VII bars a court from overriding a *bona fide* seniority plan by granting retroactive seniority to individuals never identified as victims of discrimination. *Id.* at 2589.

This Court did not hold in *Stotts* that affirmative, prospective race-conscious remedies, imposed after a finding of past intentional race discrimination, are prohibited.* The discussion in *Stotts* was limited to the range of permissible make-whole remedies and did not address the propriety of prospective remedies which are not "make-whole" in nature. Thus, in noting that its holding under section 703(h) was supported by section 706(g), the Court stated that the policy behind section 706(g) "is to provide *make-whole* relief only to those who have been actual victims of illegal discrimination." *Id.* at 2589 (emphasis supplied). In its description of the Congressional debates regarding section 706(g), the Court again repeatedly refers to the issue of "make-whole" relief. *Id.* at 2589-90 and n.15. At no point did the Court hold that a district court was barred by that section from fashioning prospective, race-conscious relief,

* This Court did not even suggest that the interim hiring and promotion goals in *Stotts*, which benefitted individuals not identified as victims of discrimination, were unlawful. See *Deveraux v. Geary*, 596 F. Supp. 1481, 1486 (D. Mass. 1984), *aff'd*, — F.2d — (1st Cir. 1985) (No. 84-2004).

which does not override a seniority system, in order to remedy the effects of proven, past discrimination.

The Second Circuit therefore correctly distinguished the instant case from *Stotts* on three grounds. First, the relief awarded by the district court does not conflict with a seniority plan.* A-30. Second, the 29% goal and the Fund order are prospective remedies designed to overcome past discrimination, unlike an award of retroactive seniority, which by its nature is a "make-whole" remedy. A-30. Third, the district court's remedies were based upon findings of past intentional discrimination. A-31.

The Second Circuit's conclusion that *Stotts* does not bar prospective, race-conscious relief that does not override a bona fide seniority system comports with that of every other circuit court considering the appropriateness of race-conscious remedies subsequent to the *Stotts* decision.**

* As the Court of Appeals noted nearly eight years ago in this litigation, seniority-based work allocation has never been a practice in the sheet metal industry. A-166.

** *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985) (affirming order that enforced consent decree provisions requiring good faith efforts toward attainment of minority hiring and promotion goals); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985) (consent decree entered after a finding of race discrimination, providing that promotions in the city fire department be made from a list of qualified candidates on a one minority to one non-minority basis for a limited amount of time, is appropriate where existing seniority system was preserved); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (*Stotts* does not undermine the group-rights goals of Title VII); *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984) (upholding voluntary affirmative hiring plan for Detroit fire department); *Johnson v. Transp. Agency*, 748 F.2d 1308 (9th Cir. 1984) (upholding a voluntary affirmative action plan containing goals for women, minorities and handicapped persons); *Palmer v. Dist. Bd. of Trustees*, 748 F.2d 595 (11th Cir. 1984) (rejecting reverse discrimination claim challenging hiring made pursuant to an affirmative action plan adopted after a finding of past

(footnote continued on next page)

Moreover, Justice White's opinion in *Stotts* does not indicate disapproval of the unanimous view of the Courts of Appeals that, in appropriate circumstances, interim goals, such as the 29% goal at issue here, may be ordered as an essential means to dismantle segregation in employment caused by past discrimination.*

Petitioners' alternative argument, that if the validity of race-conscious remedies in cases not involving seniority plans was not decided in *Stotts*, certiorari should be granted to resolve that issue, is likewise flawed. Even if that issue were an unresolved one, we submit that this case is an inappropriate vehicle for deciding it. First, as discussed in Point I, *ante*, petitioners' challenge to the 29% minority hiring goal is simply untimely. Second, the Fund was developed as a sanction for petitioners' contumacious

discrimination); *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985) (No. 1340, 1984 Term) (upholding collective bargaining agreement requiring that, in event of layoffs, percentage of minority teachers laid off would not be greater than current percentage of minority personnel employed); *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985) (upholding teacher reassignment system that required each school to employ between 75% and 125% of the existing proportion of black teachers employed city-wide).

* See, e.g., *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *United States v. Int'l Union of Elevator Constructors, Local 9*, 538 F.2d 1012 (3d Cir. 1976); *Chisohn v. United States Postal Serv.*, 665 F.2d 482 (4th Cir. 1981); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *United States v. Int'l Bhd. of Electrical Workers, Local 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979).

conduct, and not as part of the relief granted pursuant to the judgment in the underlying Title VII case. Whatever questions remain open after *Stotts* should not be decided in the context of a trial court's exercise of its contempt powers, as a district court's power to impose contempt sanctions rests not on the underlying statute but upon the court's equitable power to enforce its own decrees. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949) ("the measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief"). Relief that may not be available in an underlying action may thus be proper as a remedy for contempt of a judgment in that action. *Hutto v. Finney*, 437 U.S. at 690-92. Third, certiorari is inappropriate because, as is reflected by the absence of any split in the circuits, *ante* at 23, the Second Circuit was correct in holding that prospective race-conscious remedies, designed to overcome the effects of past discrimination, are permissible under section 706(g).

Section 706(g) recognizes the dual goals of Title VII by providing for both make-whole relief and affirmative relief. The last sentence of section 706(g) forbids courts from ordering the "hiring, reinstatement, or promotion of an individual as an employee . . . if such individual was . . . refused employment or advancement . . . for any reason other than discrimination." 42 U.S.C. § 2000e-5(g) (emphasis added). It has no bearing on affirmative race-conscious remedies, which are governed by the first sentence of section 706(g), authorizing a court to "order such affirmative action as may be appropriate" *Id.* Rather, it merely precludes a court from ordering that a particular individual be hired, promoted or reinstated if an employer pre-

viously refused to do so for non-discriminatory reasons. Affirmative remedies, in contrast, do not require the hiring, promotion or reinstatement of any particular individual, and do not create a right to a particular job on behalf of a particular individual. Rather, they are designed to overcome and eradicate systemic discrimination.*

Title VII remedies cannot be "colorblind," *Regents of the University of California v. Bakke*, 438 U.S. 265, 353 (1978) (Brennan, White, Marshall and Blackmun, J.J.), if they are "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). Where, as here, a persistent pattern and practice of unlawful discrimination is proven, race-conscious relief must be available not only to make whole the identified victims of discrimination, but also to eradicate the continuing effects of past discrimination. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364-65 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764, 771 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

* This Court has recognized that such relief will often benefit unidentified victims of an employer's pattern and practice of discrimination. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 330 n.4, 361 n.47 (1977) (partial consent decree required that vacancies be filled temporarily on a one-to-one minority/white ratio).

IV.

The Remedial Orders At Issue, Narrowly Tailored To Further The Compelling Interest In Eradicating Proven Systemic Discrimination, Fully Comport With The Governing Principles Of Equal Protection.

Echoing the same arguments offered in support of their erroneous Title VII analysis, petitioners assert that race-conscious elements of AAAPPO and the Fund order deny equal protection of the law to whites because "the non-whites benefitting from the program are not identifiable victims of past discrimination, and the whites discriminated against by the program are not persons who practiced discrimination." Pet. 14. Yet this Court long ago recognized that judicial remedies must often be race-conscious to redress meaningfully proven systemic discrimination, and that such remedies, even if non-victim specific, pass constitutional muster. *See, e.g., Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 28 (1971).

Where, as here, long-standing and pervasive discrimination has been established, race-conscious governmental action, if remedial and properly tailored, is constitutionally permissible even though it benefits unidentified members of the group suffering the discrimination. *Fullilove v. Klutznick*, 448 U.S. 448, 482-83 (1980) (Burger, C.J., White and Powell, J.J.); *id.* at 517-19 (Brennan, Marshall and Blackmun, J.J., concurring in the judgment); *Regents of the University of California v. Bakke*, 438 U.S. at 307 (Powell, J.); *id.* at 355-79 (Brennan, White, Marshall and Blackmun, J.J.); *United Jewish Organizations v. Carey*, 430 U.S. 144, 159-62 (1977) (White, Brennan, Stevens and

Blackmun, J.J.); *id.* at 179-80 (Stewart and Powell, J.J., concurring); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. at 18-21; *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Moreover, a narrowly tailored, race-conscious remedy is permissible even if it results in a "sharing of the burden by innocent parties." *Fullilove v. Klutznick*, 448 U.S. at 484 (Burger, C.J., White and Powell, J.J.); *id.* at 518 (Brennan, Marshall and Blackmun, J.J., concurring in the judgment).

As modified by the Second Circuit, AAAPPO does not require indenture of any specific ratio of non-white apprentices. Accordingly, the burden to be shared by whites is the minimum required to redress the historic exclusion of minorities from Local 28's ranks. No incumbent union member or readily identifiable applicant will be displaced by AAAPPO. Similarly, the Fund order is properly fashioned to provide compensatory services to the class of non-whites injured by petitioners' contemptuous conduct and does not impose any burden on white union members or applicants. Moreover, some provisions of the Fund order, particularly those which provide for financial assistance to employers that cannot otherwise meet the 1:4 apprentice to journeymen requirement of AAAPPO, and for incentive or matching funds to attract additional funding from governmental or private job training programs, are race-neutral and operate to the benefit of whites and non-white apprentices alike.

The Second Circuit's rejection of petitioners' constitutional challenge to AAAPPO and the Fund is thus consistent

with the governing principles formulated by this Court. There is no conflict among the circuits. No review on these bases is warranted.

Conclusion

For the foregoing reasons, respondents respectfully pray that the petition for certiorari be denied.

Dated: July 19, 1985
New York, New York

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.*
Corporation Counsel of the
City of New York
Attorney for Respondent
the City of New York
100 Church Street
New York, New York 10007

LORNA B. GOODMAN
LAURA J. BLANKFEIN
LIN B. SABERSKI
Assistant Corporation Counsel

ROBERT ABRAMS
Attorney General
of the State of New York
Attorney for Respondent
New York State Division
of Human Rights
Suite 45-08
Two World Trade Center
New York, New York 10047
(212) 488-7510

ROBERT HERMANN
Solicitor General
O. PETER SHERWOOD
Deputy Solicitor General

ROSEMARIE RHODES
LAWRENCE S. KAHN*
ALAN D. AVILES
MARTHA J. OLSON
Assistant Attorneys General

*Counsel of Record

OPPOSITION BRIEF

25
No. 84-1656

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, AND LOCAL 28 JOINT APPRENTICESHIP
COMMITTEE, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**BRIEF FOR THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

CHARLES FRIED
*Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

JOHNNY J. BUTLER
*General Counsel (Acting)
Equal Employment Opportunity Commission
Washington, D.C. 20507*

QUESTIONS PRESENTED

1. Whether as a remedy in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or as a civil contempt remedy for violation of a Title VII judgment, a court may award preferences based solely on race or ethnic background, rather than on the beneficiary's status as an actual victim of discrimination.

2. Whether such remedies are unconstitutional.

3. Whether the contempt remedies awarded in this case were procedurally defective penalties for criminal contempt.

4. Whether the proof in this case supported findings of intentional discrimination made in 1975 and sustained on appeal in 1976 and 1977.

5. Whether the district court's appointment in 1975 of an administrator to supervise compliance with its orders in this case violated the union's right to self-governance.

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**BRIEF FOR THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A52) is reported at 753 F.2d 1172. The district court's order of August 16, 1982 (Pet. App. A149-A159) holding petitioners in contempt is reported at 29 Fair Empl. Prac. Cas. (BNA) 1143. The district court's other orders relating to contempt (Pet. App. A125-A148), its order establishing an employment, training, education, and recruitment fund (Pet. App. A113-A118), and its Amended Affirmative Action Plan (Pet. App. A53-A107) and order (Pet. App. A111-A112) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1985, and the petition for a writ of certiorari was filed on April 16, 1985. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1971, the United States initiated this action in the United States District Court for the Southern District of New York against petitioners (Local 28 of the Sheet Workers' International Association and the Local 28 Joint Apprenticeship Council (JAC)) and three other locals and their apprenticeship councils. The action was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, for the purpose of enjoining a pattern and practice of discrimination against non-whites in union membership.¹ After a trial in 1975, the district court found that petitioners had purposefully denied nonwhites membership in the union in violation of Title VII (see Pet. App. A317-A363). The district court entered an order and judgment (O & J) (*id.* at A301-A316) and Affirmative Action Program and Order (AAPO) (*id.* at A230-A299) as remedies for the violation. Among other things, petitioners were ordered to achieve a nonwhite membership goal of 29% by July 1, 1981 (*id.* at A232, A305). Interim percentage goals were also set (*ibid.*), and an administrator was appointed to supervise compliance with the court's orders (*id.* at A305-A307).

On appeal, the court of appeals in 1976 affirmed the district court's finding that the defendants had "consistently and egregiously" violated Title VII but reversed part of the relief ordered in the O & J and AAPO (Pet. App. A207-A229). On remand, the district court entered a revised Affirmative Action Plan and Order (RAAPO) containing an ultimate goal of 29% nonminority membership by July 1,

¹The Equal Employment Opportunity Commission was substituted as plaintiff before trial, and the City of New York intervened as a plaintiff. The New York State Division of Human Rights was named by the union as a third party defendant but realigned itself with the plaintiffs. The Sheet Metal and Air Conditioning Contractors' Association of New York City was added as a defendant. Pet. App. A210 n.3.

1982, as well as revised interim goals and other provisions aimed at increasing nonwhite membership. *Id.* at A182-A206. A divided panel of the court of appeals subsequently affirmed the RAAPO. *Id.* at A160-A181.²

2. In April 1982, the City and State of New York moved that petitioners be held in contempt for failure to comply with the O & J, the RAAPO, and two orders of the administrator (Pet. App. A8). After a hearing, the court entered orders of contempt based on five "separate actions or omissions" that had "impeded the entry of non-whites * * * in contravention of the prior orders of [the] court."³ *Id.* at A9; see *id.* at A149-A157. The court imposed a fine of \$150,000 to be placed in a training fund to increase nonwhite membership in the union's apprenticeship program (*id.* at A156).

A year later, the City of New York again instituted contempt proceedings, this time before the administrator. The administrator concluded that petitioners were in contempt of outstanding court orders requiring them to provide records, to furnish accurate data, and to serve copies of the O & J and RAAPO on contractors who hired their members. As a remedy, the administrator suggested that petitioners pay for computerized record keeping and make further payments to the training fund. Pet. App. A127-A148. The district judge adopted the administrator's recommendations (*id.* at A125-A126).

²Judge Meskill dissented on the ground that the initial finding of liability was based on improper statistical proof (Pet. App. A169-A181).

³These were "(1) adoption of a policy of underutilizing the apprenticeship program to the detriment of nonwhites; (2) refusal to conduct the general publicity campaign ordered in RAAPO; (3) adoption of a job protection provision in their collective bargaining agreement that favored older workers and discriminated against nonwhites; (4) issuance of unauthorized work permits to white workers from sister locals; and (5) failure to maintain and submit the records and reports required by RAAPO, the O & J [order and judgment], and the administrator" (Pet. App. A9).

3. In September 1983, the district court entered two more orders. One adopted the administrator's proposal for the establishment of a fund exclusively for the benefit of nonwhites (Pet. App. A113-A118). This fund is financed by the fines previously imposed upon petitioners, as well as an assessment of \$.02 per hour to be paid by petitioner Local 28 for every hour of work done by a journeyman or apprentice (*id.* at A115). All expenses of the fund must be paid by petitioner JAC (*ibid.*). Among other things, the fund is used to train and counsel nonwhite apprentices and to provide stipends and low-interest loans to needy nonwhite apprentices (*id.* at A116-A118). The order did not require that the beneficiaries be the actual victims of the union's past discrimination.

The other order adopted an Amended Affirmative Action Plan and Order (AAAPO) (Pet. App. A111-A112), which made six significant changes in the RAAPO: (1) it required computerized record keeping; (2) it extended the affirmative action provisions to locals and their JAC's that had merged with Local 28; (3) it required that one nonwhite apprentice be indentured (i.e., enrolled in the apprenticeship program) for every white indentured; (4) it ordered that contractors employ one apprentice for every four journeymen; (5) it eliminated the apprentice aptitude exam and replaced it with a three-person selection board; and (6) it established a nonwhite membership goal of 29.23% that must be met by July 31, 1987. *Id.* at A53-A107; see *id.* at A12. As the court of appeals later explained, the AAAPPO was adopted in response to three developments in this case (*id.* at A28): "first, Local 28's failure to meet the 29% nonwhite membership goal by July 1, 1982; second, Local 28's contemptuous refusal to comply with many provisions of RAAPO; and third, the merger of several largely white locals outside New York City with Local 28."

4. A divided panel of the court of appeals held that petitioners had properly been adjudged in contempt and upheld all of the contempt penalties assessed against them. The court also sustained the AAAPPO with a few modifications. Pet. App. A1-A52.

a. The court of appeals upheld four of the five findings on which the district court's first holding of contempt was based and concluded that these findings provided a sufficient basis for contempt. Pet. App. A13-A20. The court rejected petitioners' argument that certain of the alleged violations were moot or time barred (*id.* at A14-A15). While acknowledging that the important finding of underutilization of the apprenticeship program was based in part on a misunderstanding of the statistics, the court concluded that the finding was supported by sufficient additional evidence (*id.* at A15-A17). The court reversed the finding that the adoption by petitioners and the Contractors' Association of a provision favoring the employment of older workers constituted contumacious conduct, since that provision was never implemented (*id.* at A18).⁴

b. The court of appeals similarly affirmed the district court's second holding of contempt (Pet. App. A20-A24), finding that it was supported by "clear and convincing evidence which showed that defendants had not been reasonably diligent in attempting to comply with the orders of the court and the administrator" (*id.* at A22). The court of appeals rejected petitioners' contentions that one of the violations found by the district court was based on inadmissible hearsay, that some of the violations were de minimis, and that others were barred by laches (*id.* at A20-A22).

⁴Since this was the only contemptuous conduct found to have been committed by the Contractors' Association, the court of appeals vacated all relief against the Association (Pet. App. A19-A20).

c. The court of appeals also rejected petitioners' argument that the contempt remedies were punitive and therefore could be imposed only after a criminal proceeding. Pet. App. A25-A27. The court found that the fund order was compensatory because its "purpose was to compensate nonwhites, not with a money award, but by improving the route they most frequently travel in seeking union membership" (*id.* at A26). The court also observed that the fund order was coercive because it was to remain in effect until the 29.23% goal was achieved (*id.* at A27).⁵

d. The court of appeals likewise rejected most of petitioners' challenges to the AAPO, and the court held that the AAPO did not violate Title VII or the Constitution (Pet. App. A27-A37). The court concluded that *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206 (June 12, 1984), did not require reversal of the AAPO because: (1) unlike the order in *Stotts*, the AAPO does not conflict with a bona fide seniority plan; (2) the discussion in *Stotts* of Section 706(g) of Title VII applied only to "retrospective" relief and did not address the kind of prospective relief contained in the AAPO and the Fund order; and (3) this case, unlike *Stotts*, involves intentional discrimination (Pet. App. A30-A31).

After rejecting a claim that the AAPO interfered with union self-government,⁶ the court of appeals considered the six changes made by the AAPO. The court ruled that the 29.23% nonwhite membership objective was not a permanent quota but a temporary "permissible goal." Pet. App.

⁵The court of appeals rejected the argument that reversal of the contempt finding based on the older workers' provision made it necessary to vacate the fund order; the court found that "the remedies ordered are amply warranted by the other findings of contempt" (Pet. App. A27).

⁶The court noted it had rejected this contention in previous appeals in this case (Pet. App. A31).

A31-A33. This goal, the court stated, was a remedy for Local 28's "long-continued and egregious racial discrimination," and added that the goal "will not unnecessarily trammel the rights of any readily ascertainable group of nonminority individuals" (*id.* at A31-A32).⁷ The court of appeals upheld a hiring ratio of one apprentice to every four journeymen as necessary to prevent underutilization of the apprenticeship program, the focal point of the AAPO's integration efforts. *Id.* at A33-A34. The court of appeals also approved the creation of a three-person apprentice selection board to replace the apprentice selection exams ordered by RAPO. *Id.* at A34-A35. The AAPO had abandoned these tests because they had an adverse impact on minorities, because of persistent disagreement about their validity, and because they were too costly to administer. *Id.* at A35-A36.

Finally, the court of appeals held that the district court had abused its discretion by requiring the selection of one nonwhite for every white who enters the apprenticeship program. Pet. App. A36-A37. Stressing that it would approve the use of racial quotas only when no other form of relief is available (*ibid.*), the court noted that the defendants had indentured 45% nonwhites in apprenticeship classes since January 1981 and that "there is no indication that defendants will in the future deviate from this established, voluntary practice" (*id.* at A37). Furthermore, the court reasoned that the new selection board will oversee the apprentice selection process and insure that nonwhites are selected (*ibid.*).

Judge Winter dissented (Pet. App. A38-A52), largely on the ground that the majority failed "to address the fact that Local 28 had the approval of the administrator for every act

⁷The court of appeals rejected New York City's claim that the 29.23% goal was too low, finding that this figure was not a clearly erroneous measure of the minority labor pool (Pet. App. A33).

it took that affected the number of minority workers entering the sheet metal industry" (*id.* at A38). Judge Winter argued that statistics in the record refuted the district court's central finding that the apprenticeship program had been underutilized (*id.* at A42-A48). Noting the depressed economics of the sheet metal industry, he stated (*id.* at A48) that "reactive finger pointing at Local 28 is a faintly camouflaged holding that journeymen should have been replaced by minority apprentices on a strictly racial basis" and that such a requirement "is at odds with [*Stotts*], which rejected such a use of racial preference as a remedy under Title VII." Judge Winter also disagreed with the required establishment of the training and education fund (*id.* at A48-A52).

DISCUSSION

This petition for certiorari raises three classes of interrelated issues: first, issues relating to petitioner's course of conduct, before and after the institution of this litigation, as manifesting multiple instances of illegal discrimination; second, issues relating to the correctness of the court of appeals' affirmance of the district court's finding that petitioner had acted in contempt of earlier decrees in this litigation and that this contempt has been so continuous and widespread as to warrant severe sanctions to remedy some of the consequences of that contempt and to compel compliance in the future; and third, issues relating to the failure to abide by racial quotas contained in past decrees as a proper basis for a finding of contempt, as well as the imposition of such quotas as part of the remedial scheme of the present contempt judgment affirmed below. It is the view of the EEOC and the United States that only the third set of issues, those relating to the use of goals or quotas, merits further review. This issue, however, is presented in a way that is inextricably interwoven with the other issues, which are highly fact-bound and have been reviewed and affirmed several times in the courts below, and thus are not appropriate for review in this Court at this time. Moreover, the

issue in this case which does merit further attention is presented in far clearer form, without the accretion of the massive factual record produced in numerous prior stages of this litigation, in *Local No. 93, International Association of Firefighters v. City of Cleveland (Vanguards)*, petition for cert. pending, No. 84-1999, in which the United States, as amicus curiae, has urged this Court to grant certiorari. In addition, in *Wygant v. Jackson Board of Education*, cert. granted, No. 84-1340 (Apr. 15, 1985), in which the United States has also filed a brief as amicus curiae, the Court will consider the validity under the Fourteenth Amendment of schemes designed to produce a predetermined racial representation in a particular workforce. The decisions in those cases are likely to provide substantial clarification of the principles bearing on the resolution of the third issue in this case. Accordingly, we respectfully request this Court to hold the present case pending disposition of *Vanguards* and *Wygant*.⁸

1. The orders at issue in this case contain several provisions that extend benefits to individuals solely on the basis of race and not because they are the actual victims of discrimination. Petitioners have been ordered to achieve a finely calibrated nonwhite membership "goal" — 29.23% by August 31, 1987. This goal is in reality a quota since if it is not met severe sanctions — "fines that will threaten [petitioners'] very existence" (Pet. App. A123) — have been threatened. Petitioners have also been required to make large payments into a training and education fund reserved

⁸In *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985), which involves a consent decree entered into by the Air Force, the United States will soon file a petition for a writ of certiorari raising analogous questions regarding remedies for Title VII violations. The United States will suggest that the Court hold that case as well pending disposition of *Vanguards* and *Wygant*. If certiorari is not granted in *Vanguards*, the United States will request that review be granted in *Turner*.

exclusively for nonwhites. The principal focus of the petition in this case (Pet. 11-16) is on the legality of such relief.

These provisions raise questions regarding the proper scope of remedial relief in actions under Title VII, particularly after this Court's decision in *Stotts*. These questions are discussed in the government's brief in *Vanguards*. They warrant review and clarification by this Court.

We do not recommend plenary review in the present case, however, because here the remedial issue is imbedded in layers of factual and procedural details and complications. For example, it is entirely unclear to what degree the critical 29.23% nonwhite membership "goal" rests upon the remedial authority of Title VII and to what degree it is supported by the district court's power to impose sanctions for civil contempt. According to the court of appeals (Pet. App. A28), the AAPO, which contains this "goal," was a response both to "Local 28's failure to meet the 29% nonwhite membership goal by July 1, 1982" and "Local 28's contemptuous refusal to comply with many provisions of RAPO."⁹ This certainly suggests that the 29.23% goal was imposed in part as an exercise of the district court's contempt power. However, as petitioners point out (Pet. 13), the court of appeals tested this provision solely against Title VII and Fourteenth Amendment standards (Pet. App. A27-A33). And although the court of appeals addressed the issue of contempt remedies in another portion of its opinion (*id.* at A25-A27), it did not apply this analysis to the AAPO or its 29.23% "goal."

Furthermore, this goal appears to represent nothing more than the reimposition, with a slight statistical adjustment (see note 9, *supra*), of the 29% goal embodied in the O

⁹In addition, the statistical adjustment from a goal of 29% to a goal of 29.23% responded to the merger of several other locals and their JAC's with petitioners in this case. See Pet. App. A9.

& J and RAPO, neither of which rested on the district court's power of contempt. Until the basis for the 29.23% goal is clarified by the lower courts, we think that review by this Court is unwarranted and premature. If that goal was imposed as a Title VII remedy, this case presents a question very similar to that in *Vanguards* and may be controlled by the decision in that case, if review is granted. If, however, the 29.23% goal rests substantially on the district court's power of contempt, a different question would be presented. This Court should not be asked to decide that question until the lower courts have clarified whether it is indeed presented in this case.

The race-conscious fund order has similarly uncertain foundations because it is closely tied to the 29.23% goal. The fund is to remain in existence until the 29.23% goal is met (Pet. App. A114), and until that time petitioners must make periodic payments to finance its operations (*id.* at A115). Thus, as the court of appeals recognized (*id.* at A26), the fund is in part a measure designed to coerce compliance with the 29.23% goal. If the fund lacked this coercive component, the court of appeals' conclusion (*id.* at A25-A26) that the fund was a proper remedy for civil contempt, rather than a procedurally defective criminal contempt penalty, would be substantially weakened. Because the fund and companion measures are designed to enforce the 29.23% goal, a decision striking down that goal would call into question the continued validity of these measures as well.

In sum, both the 29.23% goal and the fund order may rest to a substantial but undetermined extent upon Title VII and upon a fundamental misunderstanding of Title VII remedies. It is our hope that the proper scope of Title VII remedies will be clarified in *Vanguards* or, indirectly, in *Wygant*. The petition in this case should be held pending such elucidation.

2. Petitioners also contend (Pet. 16-17) that the sanctions ostensibly imposed in this case for civil contempt are in fact punitive and were imposed in violation of criminal contempt procedures. These sanctions include (1) a \$150,000 fine to be paid into the fund (Pet. App. A115, A156), (2) additional assessments to finance the fund (*id.* at A115), (3) a requirement of computerized record keeping (*id.* at A126), and (4) attorney's fees and expenses (*id.* at A126, A156-A157). In addition, as previously noted, the AAAPPO, to an unknown degree, may also represent a sanction for contempt. See pages 10-11, *supra*. It seems evident that most of these sanctions are closely linked to the fund and the AAAPPO, both of which, as shown above, may rest on an incorrect interpretation of Title VII. Therefore, the legality of these sanctions merits reconsideration by the court of appeals in light of *Vanguards* and *Wygant*.

3. Petitioners challenge (Pet. 18-19) findings of discrimination made a decade ago and twice affirmed by the court of appeals — in 1976 (Pet. App. A211-A215) and again in 1977 (*id.* at A169 n.8). On the latter occasion, Judge Meskill registered a strenuous dissent containing the same contention now advanced by petitioners (*id.* at A169-A181). At this late date, we do not urge review of this issue by this Court.

4. Finally, petitioners contest (Pet. 19-20) the district court's authority to appoint an administrator with broad powers over their activities. However, petitioners have not demonstrated that this issue is sufficiently important to warrant review at this time. Petitioners have not pointed to any similar measures imposed in other cases, and in the present case, petitioners have waited a decade since the administrator was appointed and nine years since his appointment was sustained by the court of appeals to take this claim to this Court (Pet. App. A220-A221).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending disposition of *Vanguards* and *Wygant*.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

JOHNNY J. BUTLER
General Counsel (Acting)
Equal Employment Opportunity Commission

JULY 1985

REPLY BRIEF

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

— against —

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, THE CITY OF NEW YORK, and
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

REPLY BRIEF OF PETITIONERS

MARTIN R. GOLD

Counsel of Record

ROBERT P. MULVEY

GOLD, FARRELL & MARKS

595 Madison Avenue

New York, New York 10022

(212) 935-9200

Attorneys for Petitioner

WILLIAM ROTHBERG

POPKIN & ROTHBERG

16 Court Street

Brooklyn, New York

(718) 624-2200

Co-Counsel for Local 28 JAC

EDMUND P. D'ELIA

655 Third Avenue

New York, New York

(212) 697-9895

Co-Counsel for Local 28

and Local 28 JAC

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No. 84-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

— against —

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, THE CITY OF NEW YORK, and
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

*Respondents.***REPLY BRIEF OF PETITIONERS**

Petitioners, Local 28 of the Sheet Metal Workers' International Association and its Joint Apprenticeship Committee, respectfully submit this Reply Brief in support of their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.¹

¹ References to the Petition for Writ of Certiorari are cited as "Pet. ____." References to the Appendix to the Petition are cited as "A-____." References to the Brief for Respondent Equal Employment Opportunity Commission ("EEOC") are cited as "EEOC ____." References to the joint brief of Respondents City of New York and the New York State Division of Human Rights In Opposition To The Petition For Writ of Certiorari are cited as "Opp. ____."

THE ISSUES RAISED IN THIS PETITION MERIT PLENARY REVIEW BY THE COURT

The Solicitor General, in his brief on behalf of the EEOC, agrees that issues raised in the present case "warrant review and clarification by this Court" (EEOC 10). He suggests, however, that the primary issue is more clearly raised in *Local No. 93, International Association of Firefighters v. City of Cleveland* (*Vanguards*), 753 F.2d 479 (6th Cir. 1985), *petition for cert. pending*, No. 84-1999 and *Wygant v. Jackson, Board of Education*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, No. 84-1340 (Apr. 15, 1985). He thus urges that this petition be held pending resolution of those cases.

The Solicitor describes the issues in the present case which warrant review as follows:

"issues relating to the failure to abide by racial quotas contained in past decrees as a proper basis for a finding of contempt, as well as the imposition of such quotas as part of the remedial scheme of the present contempt judgment affirmed below." [EEOC 8].

These issues cannot be resolved by any determination of *Vanguards* or *Wygant*.

The primary issue in the present case is the breadth of *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984) and the legality of court imposed race-conscious remedies under Title VII of the Civil Rights Act.

Wygant is purely an Equal Protection Clause case. It does not involve the Civil Rights Act or *Stotts*.

Both *Vanguards* and *Wygant* involve voluntarily-adopted affirmative action plans incorporated in consent decrees — not court imposed plans. Voluntary affirmative action was considered in *United Steelworkers of America v. Weber*, 443 U.S.

193, 208 (1979); it is not involved in the present case.² Moreover, *Vanguards* involves various threshold complications before the core civil rights issue can be addressed. First is the matter of a party to the action which objected to the consent decree, and whose standing was challenged on review. A reversal of the Court of Appeals' ruling with respect to these issues would probably end the case without consideration of the central question.

Even if this Court were to affirm on these issues in *Vanguards*, it would be required to determine if the limitations upon the district court's powers to fashion remedies under Title VII apply to consent decrees to the same extent as they do to judicially-imposed decrees. Only if this issue were decided in the affirmative would the Court reach the issue of national concern — the extent of permissible court-imposed, race-conscious remedies. The present case raises that issue directly and unavoidably.³

The fact that this case presently arises in the context of a contempt does not detract from or complicate the issues; it enhances them. The Court of Appeals justified the blatantly race-conscious Fund order as a civil contempt remedy because it "has coercive components" (A-26). The permissible breadth of contempt orders entered under the Civil Rights Act is an important issue which this Court has yet to address. It is important

² *Turner v. Orr*, 759 F.2d 817, 826 (11th Cir. 1985), in which the Solicitor General intends to file a petition for a writ of certiorari and to ask this Court to hold the case pending a resolution of *Vanguards* and *Wygant* (EEOC 9 at n.8), also involves a consent decree. There, the Court of Appeals distinguished between consent decrees and court imposed decrees as follows:

"As *Weber* made clear, Section 706(g) does not bar voluntary affirmative action agreements, such as the consent judgment in this case; it is merely a limit on what a court may 'require' in a coercive action under Title VII."

³ The Solicitor General agrees that certain remedies in this case, most notably the quota, are clearly imposed as Title VII remedies. (EEOC 10-11)

because contempt is the primary means of enforcement of the Civil Rights Act of 1964 (See 42 U.S.C. §2000(h)). The Solicitor General identifies this issue as being worthy of the court's attention (EEOC 8), but then suggests that the court hold this case pending review of others which do not raise the same issues. Plenary review of this case should be granted.

II

THE JUDICIALLY-IMPOSED INTERFERENCE WITH THE UNION'S RIGHT OF SELF-GOVERN- MENT WARRANTS REVIEW

The Solicitor General questions whether the issue of the appointment of an Administrator with broad supervisory powers over union activities as part of Title VII relief warrants this Court's attention. He states that Petitioners have not cited similar measures in other cases (EEOC 12).

However, petitioners cited three cases where this Court questioned the appointment of special masters with far-reaching managerial powers over the objections of the affected parties (Pet. 20 and n. 14). It is a simple matter to string-cite some of the numerous cases in which similar appointments have been ordered without consent of the parties. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Amos v. Board of School Directors of City of Milwaukee*, 408 F. Supp. 765, 822-25 (E.D. Wis. 1976); *Gautreaux v. Chicago Housing Authority*, 384 F. Supp. 37 (N.D. Ill. 1974); *Hart v. Community School Board of Brooklyn, New York School District #21*, 383 F. Supp. 699, 758-67 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). The appointment of Administrators to compel compliance with court-ordered Title VII relief has been particularly utilized against labor organizations following a finding of intentional racial discrimination. See, e.g., *Equal Employment Opportunity Commission v. Local 14, International Union of Operating Engineers*, 553 F.2d 251, 257-58 (2d Cir. 1977); *Rios v. Enterprise Association of Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 507 F. Supp. 1146, 1151 n. 6 (E.D. Pa. 1980), *aff'd* 648 F.2d 923 (3rd Cir. 1981), *reversed on other grounds*, 458 U.S. 375 (1982); *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, 384 F. Supp. 585, 594 (S.D.N.Y. 1974); *aff'd on other grounds*, 514 F.2d 767 (2d Cir. 1975), *cert. denied* 427 U.S. 911 (1976); *United States v. United States Steel*

Corp., 371 F. Supp. 1045, 1057 (N.D. Ala. 1973); *United States v. Bethlehem Steel Corp.*, 6 Fair Empl. Prac. Cas. (BNA) 1073 (W.D.N.Y. 1973); *United States v. Wood, Wire and Metal Lathers International Union, Local Union 46*, 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973); *United States v. Local No. 86, International Association of Bridge, Structural, Ornamental & Reinforcing Ironworkers*, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971). See also, Harris, *The Title VII Administrator: A Case Study In Judicial Flexibility*, 60 CORNELL L. REV. 53 (1974).

In the present case, the Court of Appeals has twice recognized that the appointment of the Administrator was in conflict with the national goal of union self-government, (A-31, 220), but it still approved the continuation of the office over the union's protests. Dissenting Judge Winter stated that the appointment of the Administrator was tantamount to a judicially-imposed receivership. (A-38, 45).

The appointment of an administrator in this case to oversee union compliance with Title VII remedial programs is not an isolated event. Such intrusions into union autonomy are commonplace and certain to recur. This Court's consideration of the issue is clearly warranted.

II

ALL OF THE QUESTIONS PRESENTED ARE RAISED IN A TIMELY MANNER

Respondents City of New York and the New York State Division of Human Rights oppose certiorari on the erroneous contention that the petition is directed more to the underlying remedial orders than the contempt (Opp. 2), and that this Court is foreclosed from considering (1) the original order finding intentional discrimination and establishing the affirmative action program, (2) the legality of the quota, and (3) the continuation of the Office of the Administrator.

However, the Court of Appeals decision to which this petition is addressed (A-1-52) considered not only the contempt findings, but also direct and timely appeals from (1) AAAPPO itself which perpetuated and enhanced the affirmative action program and the Office of the Administrator, (2) the order fixing the quota, and (3) the Fund Order. In the Court of Appeals, respondents never questioned the appealability of any of these issues. The entire court below considered all issues, including the constitutionality of the quota, the impact of the *Stotts* decision, and the challenge to the Office of the Administrator, to be properly and timely raised. These matters are clearly before this Court in a timely fashion.

In addition to these questions, petitioners have now raised issues as to the 1975 Order and Judgment ("O&J") which enjoined Petitioners from further discrimination, and which also established the racial quota and the Office of the Administrator which are both continued by orders directly reviewed below. Respondents urge that review of the underlying finding is untimely because Petitioners did not seek certiorari from two prior Court of Appeals decisions upholding the O&J and the statistical

evidence for the district court's finding of intentional discrimination.*

The unappealed decisions of the Court of Appeals are the law of the case, but they do not preclude further review by this Court. *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186 (1950); *United States v. A.S. Kreider*, 313 U.S. 443 (1941); *Burnrite Coal Briquette Co. v. Riggs*, 274 U.S. 208 (1927); *Diaz v. Patterson*, 263 U.S. 399 (1923); *Messenger v. Anderson*, 225 U.S. 436 (1912). Indeed, in the second appeal below, Judge Meskill in his dissent expressly noted that the Supreme Court would not be bound by the "law of the case" and could review its prior rulings on the original finding of intentional discrimination and the statistical predicate for such finding when the case ultimately reached this Court on certiorari. (A-170 and A-170 n.1). It should do so now.

* Contrary to the arguments of all respondents, Petitioners have not requested this Court to review the statistical evidence which purportedly established the findings of intentional discrimination. Rather, Petitioners have questioned whether the district court's findings were in accordance with the Court's guidelines for the use of such statistical evidence in employment discrimination cases (Pet. 18-19). No *de novo* review of the statistics themselves is required or requested.

CONCLUSION

Petitioners respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
August 7, 1985

Respectfully submitted,

MARTIN R. GOLD
(*Counsel of Record*)
ROBERT P. MULVEY
GOLD, FARRELL & MARKS
595 Madison Avenue
New York, New York 10022
(212) 935-9200

Attorneys for Petitioner

WILLIAM ROTHBERG
POPKIN & ROTHBERG
16 Court Street
Brooklyn, New York
(718) 624-2200

Co-Counsel for Local 28
JAC

EDMUND P. D'ELIA
655 Third Avenue
New York, New York
(212) 697-9895

Co-Counsel for Local 28
and Local 28 JAC

SUPPLEMENTAL BRIEF

SEP 12 1985

JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1656 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION AND LOCAL 28 JOINT APPRENTICESHIP
COMMITTEE, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CHARLES FRIED

*Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

JOHNNY J. BUTLER

*General Counsel (Acting)
Equal Employment Opportunity Commission
Washington, D.C. 20507*

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1656

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION AND LOCAL 28 JOINT APPRENTICESHIP
COMMITTEE, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Pursuant to Rule 22.6 of the Rules of this Court, the Solicitor General files this supplemental memorandum to inform the Court of the decision of the United States Court of Appeals for the Eleventh Circuit in *Paradise v. Prescott*, No. 84-7053 (Aug. 12, 1985), and the decision of the United States Court of Appeals for the Third Circuit in *Pennsylvania v. Local Union 542, International Union of Operating Engineers*, No. 84-1614 (July 17, 1985).

In our brief in this case, we suggested that the petition be held pending disposition of the petition in *Local No. 93, International Association of Firefighters v. City of Cleveland (Vanguards)*, petition for cert. pending, No. 84-1999, in which the United States, as amicus curiae, has urged this

Court to grant certiorari.¹ In *Vanguards*, the United States argued that the courts of appeals have given this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206 (June 12, 1984), an unduly narrow interpretation by holding, among other things, that *Stotts* does not apply to consent decrees and applies only when seniority rights are abridged. Since the filing of that brief, the two court of appeals decisions noted above have come to our attention.

In *Paradise v. Prescott, supra*, a public employer and intervening non-minority employees contended that a court-ordered promotional quota exceeded the district court's Title VII remedial authority as interpreted in *Stotts*. The court of appeals "concede[d] that a superficial reading of *Stotts* supports [this] position" (slip op. 5782). However, the court stated (*ibid.* (emphasis added)): "We view [*Stotts*] as limited to its own facts." The court went on (slip op. 5782-5784) to hold (*id.* 5782-5783) that *Stotts* does not apply where a bona fide seniority system is not affected or where the challenged quota is entered under the mantle of a consent decree.

In *Pennsylvania v. Local Union 542, supra*, in which the Third Circuit affirmed an injunctive decree imposing race-conscious relief, the court held that *Stotts* did not govern, principally because a bona fide seniority system was not affected.

¹We are serving copies of this supplemental memorandum on the other parties in *Vanguards*, as well as the parties in *Orr v. Turner*, petition for cert. pending, No. 85-177, in which the United States has petitioned for certiorari and has suggested that its petition be held and disposed of as appropriate in light of this Court's disposition of *Vanguards* and *Wygant v. Jackson Board of Education*, cert. granted, No. 84-1340 (Apr. 15, 1985).

For the convenience of the Court, we have lodged ten copies of each decision with the Clerk of this Court.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985

JOINT APPENDIX

No. 84-1656

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

Supreme Court, U.S.

FILED

DEC 6 1985

JOSEPH B. SPANIOLO, JR.
CLERK

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

— against —

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, THE CITY OF NEW YORK, and
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX
JA-1-JA-415

MARTIN R. GOLD
GOLD FARRELL & MARKS
Attorneys for Petitioners
595 Madison Avenue
New York, New York, 10022
(212) 935-9200

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

LAWRENCE S. KAHN
Attorney for Respondent
New York State Division
of Human Rights
Two World Trade Center
New York, New York 10047
(212) 488-7510

FREDERICK A.O. SCHWARZ, JR.
Attorney for Respondent
The City of New York
100 Church Street
New York, New York 10007
(212) 566-3929

Petition for Writ of Certiorari filed April 16, 1985
Petition for Writ of Certiorari granted October 7, 1985

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* Items designated with an Asterisk have been previously reproduced in the Appendix to the Petition for Certiorari.

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* Items designated with an Asterisk have been previously reproduced in the Appendix to the Petition for Certiorari.

Relevant Docket Entries	Filed
Complaint	June 29, 1971
Findings of Fact and Conclusions of Law	January 3, 1972
Opinion Number 38,569	June 15, 1972
Opinion Number 38,646	July 7, 1972
Order	April 11, 1974
Order	July 3, 1974
Plaintiff's Affidavit and Show Cause Order to Adjudicate Defendants in Contempt	October 7, 1974
Stipulation of Facts	December 16, 1974
Opinion Number 42,823	July 18, 1975
Transcript of Proceedings Dated January 13-17, 20-24, 28-30, 1975	July 31, 1975
Judgment and Order	August 29, 1975
Opinion Number 43,357	November 6, 1975
Affirmative Action Program and Order	November 25, 1975
Order of the United States Court of Appeals	June 4, 1976
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Administrator's Memorandum and Order	October 29, 1980
Defendants' Report and Affidavit	December 15, 1980
Defendants' Answers to Interrogatories	June 23, 1981
Order	September 3, 1981
Affidavit of Edmund P. D'Elia in Opposition to Administrator's Application for Increase in Fees	October 15, 1981
Orders to Show Cause Before Special Master Re Violations	October 30, 1981
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Memorandum and Order Imposing 29.23% Membership Goal	September 1, 1983

Memorandum and Order Re
Amended Affirmative Action Plan
and Order

September 1, 1983

Order Establishing Employment,
Training, Education and Recruit-
ment Fund

September 1, 1983

Procedures For Implementing
Order Establishing Employment,
Training, Education and Recruit-
ment Fund

October 6, 1983

Amended Affirmative Action Pro-
gram and Order

November 4, 1983

Defendants' Affidavit and Notice of
Motion for an Order for Reduction
in Administrator's January 1984 Bill

February 14, 1984

Defendants' Affidavit and Notice of
Motion for an Order for Reduction
in Administrator's February 1984 Bill

March 9, 1984

Memo Endorsed

March 21, 1984

Administrator's Objections to Pro-
posed Modified Affirmative Action
Program and Order

May 16, 1984

Order

October 18, 1984

The Opinion of the Court of Appeals for the Second Circuit
Dated January 16, 1985 is reprinted at A-1 of the Appendix to
the Petition for Certiorari

Letter dated July 27, 1984 from Warren Bo Duplinsky (EEOC)
to Second Circuit Court of Appeals

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

July 27, 1984

Honorable Ralph K. Winter
Honorable George C. Pratt
Honorable Walter R. Mansfield

George A. Fischer, Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: *EEOC v. Local 638, et al.*, No. 82-6241, etc.

Dear Sirs:

We write in response to letters submitted to this Court on July 10 & 24, 1984, by counsel for appellants, regarding the Supreme Court's recent decision in *Firefighters Local Union No. 1784 v. Stotts*, 52 U.S.L.W. 4767 (June 12, 1984). In their letters, appellants state that the decision affects the proprietary of the indenture ratio and fund order provided by the district court. They also submitted a brief filed by the Department of Justice in another case in another court. We strongly believe that the decision in *Stotts* does not affect the disposition of the issues in this appeal. However, if this Court feels that the *Stotts* decision is crucial to its determination, we request the opportunity to more fully set forth our views. We briefly outline our position below.

Although we have argued that the indenture ratio and the fund order are inappropriate under the facts of this case, availability of such remedies in appropriate factual settings is of the utmost importance in eliminating the vestiges of employment discrimination in our workforce. This court has repeatedly recognized this fact. See e.g. *Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 278-83 (1981); EEOC Br. at 16-17.

Every court of appeals has similarly held. See cases cited in *Stotts*, 52 U.S.L.W. at 4781 (Blackmun, J. dissenting). The *Stotts* decision does not overrule this long-standing principle of law. Indeed, the majority in *Stotts* did not even mention this line of cases.

In *Stotts*, the Supreme Court held that a lower court order overriding a *bona fide* seniority system in order to effectuate the purposes of a Title VII consent decree which made no provision with respect to seniority or layoffs, was inconsistent with §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), and "the policy behind §706(g) of Title VII [42 U.S.C. 2000e-5(g)]." 52 U.S.L.W. 4772.

Appellants acknowledge in their letter that, since there is no seniority system at issue in this appeal, the Court's discussion of §703(h) is clearly irrelevant. Similarly, the court's discussion of §706(g) is not relevant to the relief challenged by the appellants since it relates only to the award of retroactive or "make whole" relief and not to the use of prospective remedies, such as the indenture ratio or the fund order, designed to dismantle prior patterns of job segregation and to insure the prospective integration of unions and workforces by increasing future employment opportunities for blacks and other minorities as a class. This Court has recognized that the two forms of relief — "make whole" and affirmative prospective measures — are distinct and have different objectives. See, e.g., *Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d at 279-80. The Court in *Stotts* held that the district court's order overriding the seniority system was inconsistent with "the policy behind §706(g) of Title VII", viz., "to provide make whole relief only to those who have been actual victims of illegal discrimination." (Slip op. at 16-17, 19). The Court gleaned this policy from excerpts from the 1964 legislative history of Title VII, primarily from statements relating to the last sentence of §706(g) which provides that "[n]o order of the court shall require ... the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay, if such individual ... was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, religion, sex, or national origin" 42 U.S.C. 2000e-5(g).

Since the Court's entire discussion is carefully limited to the improper award of "make whole" relief, it is clear that the Court consciously avoided addressing the broader question of the availability of prospective race conscious relief. Instead, the Court's disagreement with the district court and court of appeals, and with the dissenting Justices, turns on the characterization of the relief awarded in that case. The court of appeals, and the dissenting opinion in the Supreme Court, characterize the order issued by the district court as an adjunct to the prospective, race-conscious relief provided in the underlying consent decree, and, therefore, as permissible under §706(g). The majority opinion, however, views the order as an award of retroactive seniority to specific members of a racial class, and therefore, as impermissible under §706(g) absent a showing that they were victims of discrimination. Because of its characterization of the order in *Stotts* as "make whole" relief, it was unnecessary for the Court to reach the broader question of the availability of prospective, numerical relief, and the Court carefully avoided doing so in its own statements.

Since the effect of the layoffs on individual employees could be readily determined (see 56 U.S.L.W. at 4771), the district court's injunction, which had the effect of shifting the impact of the layoffs to other identifiable individuals, can fairly be characterized as tantamount to a grant of retroactive seniority to those black employees who avoided layoff. By contrast, the typical prospective remedy cannot be so characterized. For example, the indenture ratio and fund order at issue in this case do not by their terms or in effect require the union to indenture or train any particular individual, nor do they have the effect of depriving any particular individual of indenture or training. We believe that this important factual difference between the *Stotts* case and the case presently before this Court adequately distinguishes the two cases.

The last sentence of §706(g), on which the *Stotts* decision is based, deals with "make whole" relief and does not even address prospective relief, let alone state that all prospective remedial orders must be limited so that they only benefit the specific victims of the employer's or union's past discriminatory acts.

Moreover, the language and the legislative history of §706(g) support the Commission's position that carefully tailored prospective race-conscious measures are permissible Title VII remedies. As the dissenting opinion points out (52 U.S.L.W. at 4781), this view has been adopted by every federal court of appeals. Further, the fact that this interpretation was consistently followed by both agencies charged with enforcement of Title VII, the Commission and the Department of Justice, during the years immediately following enactment of Title VII entitles the interpretation to great deference. See *General Electric v. Gilbert*, 429 U.S. 125, 141-42 (1976); *Griggs v. Duke Power Co.*, 410 U.S. 424, 435 (1971).

Thus, appellants' suggestion that the *Stotts* decision calls into question the general availability of prospective Title VII remedies, such as the indenture ratio and fund order in this case, is not supported by the opinion itself. Indeed, if the Court had intended to invalidate the use of prospective race-conscious remedies in general, it could have simply struck down the underlying consent decree in *Stotts*. As the Court noted, that decree, which was still in effect, included a one-for-one hiring ratio. 52 U.S.L.W. at 4768.

For these reasons we believe the *Stotts* decision should have no effect upon the Court's deliberations regarding this appeal.

Sincerely,

WARREN BO DUPLINSKY
Attorney

cc: Counsel

The Amended Affirmative Action Program
and Order Entered November 4, 1983 is
reprinted at A-53 of the Appendix to the
Petition for Certiorari

The Order Entered October 13, 1983 Setting Forth
Procedures for Implementing Order Establishing
Employment, Training, Education and
Recruitment Fund is reprinted at A-108
of the Appendix to the Petition for Certiorari

The Order Entered September 1, 1983 Adopting
Amended Affirmative Action program and
Order is reprinted at A-111 of the Appendix
to the Petition for Certiorari

The Order Entered September 1, 1983 Establishing
Employment, Training, Education and
Recruitment Fund is reprinted at A-113
of the Appendix to the Petition for Certiorari

The Memorandum and Order Entered September 1, 1983
Imposing 29.23 % Nonwhite Membership Goal
is reprinted at A-119 of the Appendix
to the Petition for Certiorari

The Order Entered August 24, 1983 Holding
Local 28 and the JAC in Contempt and
Imposing Sanctions is reprinted at A-125
of the Appendix to the Petition for Certiorari

The Administrator's Memorandum Decision Entered
June 9, 1983, Finding Local 28 and the
JAC Violated O&J and RAAPO is reprinted
at A-127 of the Appendix to the
Petition for Certiorari

**United States District Court
Southern District of New York**

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION and
THE CITY OF NEW YORK,

Plaintiffs,

— against —

LOCAL 638 ...
LOCAL 28 OF THE SHEET METAL WORKERS' IN-
TERNATIONAL ASSOCIATION, LOCAL 28 JOINT
APPRENTICESHIP COMMITTEE ... SHEET METAL
AND AIR-CONDITIONING CONTRACTORS'
ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION
FOR AN ORDER OF VIOLATION

71 Civ. 2877 (HFW)

STATE OF NEW YORK

:SS:

COUNTY OF NEW YORK

CHARLES R. FOY, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, attorney for plaintiff City of New York ("City").

2. I am fully familiar with the facts and circumstances herein. I submit this supplemental affidavit in support of the City's motion for an order citing defendants Local 28 of the Sheet Metal Workers' International Association ("Local 28"), Local 28 Joint Apprenticeship Committee ("JAC"), the Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association") and eleven (11) individually named Local 28 contractors ("respondents") for violating the Order and Judgment ("OJ"), the Revised Affirmative Action Program and Order ("RAAPO")

and a directive of the Administrator dated November 20, 1981.

Local 28's Failure To Comply With OJ
¶s 21(e)(xii), 21(i) 21(j) and RAAPO ¶ 33, 33(f)
and 34(a)

3. Local 28 claims that it did not violate OJ ¶21(j) when it granted membership status to individuals graduating from the JACs of former locals 10, 13 and 55 ("former locals"). Affidavit of Edmund D'Elia, dated April 14, 1983 ("D'Elia Affd.") Rather, Local 28 claims that pursuant to President Carlough's October 16, 1981 and March 23, 1982 merger orders such individuals were "assigned and transferred" to Local 28. As apprentices are not granted membership status in Local 28 until they complete their apprenticeship and pay their initiation fee, it was beyond President Carlough's power to assign or transfer the apprentices in the former local's JACs into Local 28.

4. In addition to improperly granting membership status to graduates of the former locals' JACs and permitting members of the former locals to work within New York City (See Foy Affidavit, dated April 11, 1983, ¶15) ("Foy Affd."), Local 28 has failed to comply with reporting requirements regarding its membership.

5. Paragraphs 21(e)(xii) and 21(i) of the OJ requires that Local 28 maintain records of whites and non-whites employed as sheet metal workers by Local 28 contractors and provide yearly reports listing all members of Local 28 with their racial identification. No report submitted by Local 28 contained such information regarding members of Local 28 who were formerly members of the merged locals.

6. Local 28 is also required to submit the names of individuals admitted to journeyman status within 5 days of their admission. See, RAAPO ¶34(a). If, as the record makes clear and Local 28 now admits, journeymen in of the merged locals were transferred into Local 28 pursuant to President Carlough's merger orders and are full of members of Local 28, then Local 28 should have provided the names of all such individuals within five days of the relevant merger orders. (See, Proposed Stipulated Findings of Fact, dated April 15, 1983, ¶s 17, 30, 47-48; D'Elia Affd., p 2).

7. In violation of RAAPO ¶33 33(f) Local 28 has failed to submit

every 3 months the names of all those individuals who have sought or applied for transfer into Local 28, including those individuals from the merged locals.

JAC's Failure To Comply With RAAPO
¶s 20(c)(iv)(b) and 35(c)

8. Paragraph 20(c)(iv)(b) of the RAAPO requires the JAC submit monthly reports which contain, among other items, the number of hours each apprentice worked. Six months after an apprentice class is indentured the JAC is required to file a summary of the monthly reports submitted pursuant to ¶20(c)(iv)(b). See, RAAPO ¶35(c). The JAC has filed inaccurate reports under ¶20(c)(iv)(b) and has failed to file the required reports under ¶35(c).

9. As detailed in ¶s 17-19 of the Foy Affidavit, a review of CETA contractor vouchers discloses that the Monthly Manpower Reports JAC has submitted do not accurately reflect the hours actually worked by a number of apprentices. The JAC does not deny that there is such an inconsistency between the CETA contractor vouchers and the Manpower Reports. See, affidavit of William Rothberg, dated April 13, 1983, ("Rothberg Affidavit"). Rather, JAC contends that it has no access to information indicating the number of hours an apprentice worked on a particular day, that reports indicating the number of apprentices unemployed are sufficient and that there really is no need for reports concerning manpower hours. See, Rothberg Affidavit, ¶s 21-22. Thus, JAC believes itself to be in "full compliance . . . with all aspects of RAAPO." See, Rothberg Affidavit ¶26. The facts, however, speak differently.

10. JAC can obtain the necessary information from Local 28 contractors. If the contractors fail to supply the number of hours their employees work the JAC can, as the City previously has, bring Orders to Show Cause to obtain such information. While JAC is correct in asserting the plaintiffs are to enforce the OJ and RAAPO, it overlooks its own obligation to obtain required information. See, Foy Affidavit, Exhibit "14." Sending letters, as JAC has done in response to prodding by the City, is insufficient if it fails to result in production of the required information. See, *Id.*: Rothberg Affd., Exhibit "C." Failure to provide this information

is especially disturbing when JAC has admitted it can obtain the data from sources other than individual contractors. See, Rothberg Affd., ¶23.

11. The very fact that CETA contractor vouchers do not match the Manpower Reports demonstrates the absurdity of JAC's argument that statistics showing the number of apprentices not working is sufficient. Such an argument ignores 20(c)(iv)(b)'s requirement that manpower hours, and not merely the number of unemployed apprentices, be provided. Nor does JAC's claim that there is no need for manpower hours hold much water. This position ignores the fact that the OJ and RAAPO require equitable distribution of work among whites and non-whites. JAC's position again demonstrates its attitude that JAC, and not the court, should determine what information is required. See, 29 FEP Cases 1146; Foy Affd., Exhibits "13" and "14."

Respondents' Failure To Comply With OJ
¶s 1, 7, 8 and RAAPO ¶s 20(c)(iv)(a)

12. Respondents' attorney claims that there is "no direct requirement for an employer to file . . . manpower reports" or "to furnish the number of hours worked by its employees." See Rothberg Affidavit ¶ 7, 12. Such an assertion disregards this court's orders and the history of this litigation.

13. Paragraphs 1, 7 and 8 of the Order and Judgment enjoin any party in active concert or participation with the defendants from taking any action which would impede or interfere with the operation of the OJ. In order to put Local 28 contractors on notice of this obligation the Administrator required plaintiffs to serve copies of the OJ and the RAAPO upon all such contractors. See, Memorandum and Order, dated July 30, 1979 and Amended Memorandum and Order, dated March 12, 1980, annexed as Exhibit "1-A." The Administrator's intent to have employers submit both journeyman and apprentice statistics and manpower hours is demonstrated by Exhibit 1-A. At the same time he required plaintiffs to serve the OJ and the RAAPO upon Local 28 contractors, pursuant to his authority under OJ ¶s 14(a) and 14(g) the Administrator required defendants to provide data regarding work hours. For defendants to be able to provide the required data and enable the parties to determine the defendants' ability to

comply with the OJ the Administrator required Local 28 contractors to cooperate with the defendants in obtaining the data. Such cooperation includes supplying the JAC with manpower hours.

Time Limitation

14. Defendants and respondents claim that the City's motion should be dismissed in that the motion was brought after more than 30 days after the situation complained of arises. See, RAAPO ¶41(b). In face of prior rulings regarding the effect of ¶41(b) such an argument is without merit. As Judge Werker has stated, the "mere fact that plaintiffs did not register a complaint under ¶41(b) cannot be utilized by defendants to relieve themselves from compliance with the other terms and conditions of the RAAPO and OJ." 29 FEP Cases 1146 (S.D.N.Y. 1982).

Conclusion

15. The evidence establishes that defendants and the eleven individually-named contractors have violated the decrees of this Court, specifically OJ ¶s 1, 7, 8, 21(e)(xii), 21(i), 21(j); RAAPO ¶s 20(c)(iv)(a), 20(c)(iv)(b), 33, 33(f), 34(a), 35(c); and the Administrator's November 20, 1981 directive.

WHEREFORE, to ensure that such violations cease and to compensate those non-whites who have been injured as a result of these violations, the City respectfully requests that this Court grant its motion, find that Local 28, the Local 28 JAC, the Contractors' Association and the eleven individually named contractors have violated this Court's orders, and award the relief requested herein and any other relief the Court may find just and proper.

CHARLES FOY
Assistant Corporation Counsel

Sworn to before me this
25th day of April, 1983

United States District Court Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION and
THE CITY OF NEW YORK,

Plaintiffs,

— against —

LOCAL 638 ...
LOCAL 28 OF THE SHEET METAL WORKERS' IN-
TERNATIONAL ASSOCIATION, LOCAL 28 JOINT
APPRENTICESHIP COMMITTEE ... SHEET METAL
AND AIR-CONDITIONING CONTRACTORS'
ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION
FOR AN ORDER OF VIOLATION

71 Civ. 2877 (HFW)

STATE OF NEW YORK

:SS:

COUNTY OF NEW YORK

CHARLES R. FOY, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, attorney for plaintiff City of New York ("City").

2. I am fully familiar with the fact and circumstances herein. I submit this affidavit in support of the City's motion for an order citing defendants Local 28 of the Sheet Metal Workers' International Association ("Local 28"), Local 28 Joint Apprenticeship Committee ("JAC"), the Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association") and eleven (11) individually named Local 28 contractors ("respondents") for violating the Order and Judgement ("OJ"), the

Revised Affirmative Action Program and Order ("RAAPO") and a directive of the Administrator dated November 20, 1981.

I. Prior Proceedings

3. This action was originally commenced by the Equal Employment Opportunity Commission ("EEOC") in 1971 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.*, charging *inter alia*, that Local 28, the JAC and the Contractors' Association had engaged in a pattern and practice of discrimination against Black and Spanish-surnamed individuals with respect to recruitment, selection, training and admission into Local 28, admission into membership in the Local 28 Apprenticeship Program, and employment opportunities as sheet metal workers in New York City.

4. On June 6, 1972 the City moved pursuant to Rule 24(a) of the F.R. Civ. Pro. to intervene in this proceeding because the City Commission on Human Rights had pending before it an administrative proceeding against Local 28 which would be affected by a decree in this action. The motion to intervene was granted on June 14, 1972.

5. The action was tried from January 13, 1975 to February 3, 1975. In a decision dated July 18, 1975 Judge Henry F. Werker held that Local 28 and the JAC had illegally denied non-whites access to employment opportunities in the sheet metal trade. (401 F. Supp. 467.) Judge Werker held that Local 28 and the JAC denied non-whites such employment opportunities, by *inter alia*, (a) failing to administer yearly validated journeymen tests; (b) selectively organizing non-union sheet metal shops with few non-white employees, and/or admitting from such shops only white employees; (c) accepting as transfer members whites from affiliated sister locals while refusing transfers of non-whites; and (d) utilizing an apprenticeship examination which had an adverse impact upon non-whites and which was not job-related.

6. On August 25, 1975 an Order and Judgement ("OJ") was entered in this action. The OJ provided, in part, that Local 28 and the JAC undertake a program of advertising and publicity to inform the non-white community of non-discriminatory opportunities in Local 28 and the Apprenticeship Program (§21 (h)),

established permissible methods of entry into Local 28 and the Apprenticeship Programs (§s 21 (a), (b)(C) and 22(b)) and required that without court approval Local 28 and the JAC could not, modify the conditions or terms upon which an individual became a member of the Apprenticeship Program or Local 28 or be entitled to work within the jurisdiction of Local 28 (§ 21 (j)). In addition, the OJ enjoined the defendants from any act or practice which would have the purpose or effect of discriminating in recruitment, selection, training, admission to membership in Local 28, admission to membership in the Apprenticeship Program, or any terms and conditions of employment on the basis of race, color or national origin (§s 1, 7 and 8).

7. Pursuant to the Order and Judgment, an Affirmative Action Program and Order ("Program") had been entered on November 25, 1975. This Program was required to be modified by the Court of Appeals' decision dated March 6, 1977 (532 F.2d 821). That decision did not affect the provisions of the Order and Judgment relied upon herein, which were affirmed. *Id.* A Revised Affirmative Action Program and Order ("RAAPO") was entered on January 19, 1977. The RAAPO specified methods by which defendants were to comply with the OJ. These methods included complying with City Executive Orders and contractual requirements for the employment of minority trainees on City construction projects (§s 20(d)(ii), 31(f)) and submitting specified reports (e.g., §s 20(d)(iii), 33(k)). On appeal RAAPO was affirmed. (565 F.2d 31 (CA2 1977)).

8. On April 16, 1982 the City and the State moved for an order citing the defendants and one hundred and twenty-one contractors for contempt of court for violating the OJ, the RAAPO and orders of the Administrator. After a hearing, Judge Werker issued a decision dated August 16, 1982 finding that by six separate actions or omissions the defendants violated prior orders of the court (29 FEP Cases 1143 (SDNY 1982)).

9. Subsequently, the parties entered into negotiation of a new affirmative action plan ("AAP"). As a result of these negotiations a Modified Affirmative Action Program and Order ("MAAPO") was presented to the Court. The defendants and the State both supported the adoption of MAAPO, while the City took a position of non-opposition with regard to MAAPO. The EEOC opposed MAAPO.

10. Since the MAAPO was negotiated a series of violations of this court's orders HAS COME TO LIGHT and are detailed below. These violations lead to the City opposing MAAPO and instituting the instant proceeding. (See Foy April 7, 1983 letter annexed hereto as Exhibit "1").

II. Parties

11. While individual sheet metal contractors are not named parties to this action, they have been enjoined from discriminatory employment practices. (See OJ ¶s 7, 8). By a Memorandum and Order of the Administrator dated July 30, 1979 and an Amended Memorandum and Order ("AMO") dated March 12, 1980, the Administrator directed the City and the E.E.O.C. to serve by certified mail members of defendant Contractors' Association, employers who have a contractual relationship with Local 28 and employers who utilize JAC apprentices, with a certified copy of the Order and Judgment and the RAAPO. By so serving these employers, plaintiffs put them on notice of their obligations under the OJ and the RAAPO, which include filing weekly manpower reports. Eleven of these contractors are named as respondents to this motion for failure to submit accurate manpower reports. (See ¶s 16-19 below).

Violations of the OJ, the RAAPO and the Administrator's November 20, 1981 Directive

12. The OJ as well as the RAAPO require defendants to take affirmative steps to overcome their history of discriminatory acts. This obligation has in no way been lessened by the presentation to the Court of MAAPO. Rather, as the court's August 16, 1982 Memorandum Decision makes abundantly clear, defendants' obligation is a continuing one. However, defendants have continued to engage in violation of this court's orders which directly evidence discrimination. These violations are:

- (a) the granting of membership status in Local 28 to individuals whose entry into Local 28 does not conform with the requirements of the OJ and the MAPPO and allowing such individuals to work within Local 28's jurisdiction. See, OJ ¶21(j);

- (b) the failure to submit complete and accurate records. See, OJ ¶s 1, 7, 8, 14(a), 14(g); (21)(e)(xii) and 21(i); [RAAPO ¶s 20(c)(iv)(B) and 33(K);] and
- (c) the failure to serve copies of the OJ and the RAAPO upon contractors or to file proof of such service with the parties as required by the Administrator's November 20, 1981 directive (See Raff November 20, 1981 letter annexed hereto as Exhibit "2").

The net effect of these violations has been the continued denial of the civil rights to non-whites.

Evidence of Violations of the OJ, the RAAPO and the Administrator's November 20, 1981 Directive

(a)

13. The OJ and the RAAPO set forth the conditions or terms by which an individual may be granted membership status in Local 28 or be entitled to work within Local 28's jurisdiction. (See, OJ ¶s 21(a)(b), 22(b)(c); RAAPO ¶ 3). The defendants are prohibited from changing, modifying or amending such conditions or terms. (See, OJ ¶21(j)).

14. In October, 1981 the President of the Sheet Metal Workers' International Association ("International") ordered that former Locals 10, 13, 22 and 559 be merged into Local 28. (See, Carlough October 16, 1981 letter, annexed hereto as Exhibit "3"). Subsequently, the International President issued an order directing that Local 55 be merged into Local 28. (See, Carlough March 23, 1982 letter annexed hereto as Exhibit "4"). Discovery has disclosed that as a result of these mergers a number of individuals have become Local 28 members who are entitled to work within Local 28's jurisdiction without having done so in conformity with the OJ and the RAAPO. These individuals include seven apprentices who have graduated from former local 13's Apprenticeship Program ("JAC-13"), five apprentices who have graduated from former Local 55's Apprenticeship Program ("JAC-55") and twenty-nine apprentices who have graduated from former Local 10's Apprenticeship Program ("JAC-10") See, JAC-13's Responses to City's Interrogatories, at 8 ("JAC-13's Resps."),

JAC-55's Responses to City's Interrogatories, at 6 ("JAC-55's Resps.") and Local 28's Responses to City's Second Set of Interrogatories at 8 ("Def's. Second Resps.") annexed hereto as Exhibits "5", "6" and "7"). All of these former apprentices pay dues to Local 28 and are Local 28 members. (Id.).

15. Since the merger of Locals 10, 13 and 55 into Local 28 members of these former locals have paid dues to Local 28 and have been accorded membership status in Local 28. (Transcript of May 20, 1982 Inquest before Administrator at 24, 26 ("Tr. _____"). As a result, they have been entitled to work within Local 28's jurisdiction. Nothing in either Local 28's or the International's Constitution prohibits these former members of former Locals 10, 13 and 55 from working within Local 28's jurisdiction. (See, Exhibits "3" and "4"). In fact, the International has taken the position that the former members of former Locals 10, 13 and 55 may work within Local 28's jurisdiction (See, Exhibits "3" and "4"). By granting membership status in Local 28 by methods which do not conform to the OJ or the RAAPO (e.g., these individuals have not passed a validated hands-on test) and permitting these mechanics to work within Local 28's jurisdiction* Local 28 has violated ¶ 21(j) of the OJ.

(b)

16. In three different ways defendants and respondents have not complied with the OJ and RAAPO's reporting requirements. It is through records provided by defendants and respondents that plaintiffs are able to evaluate defendants' compliance with the OJ and determine what methods can assist the defendants in compliance.

17. All contractors who have a contractual relationship Local 28 or employ JAC apprentices and have been served with copies of the OJ and the RAAPO are required to file weekly manpower reports with the JAC. The JAC compiles these reports and files them with the Administrator on a monthly basis (See, RAAPO ¶33(K)).

*The City does not take the position, or in any way mean to imply, that Local 28's jurisdiction remains limited to New York City.

18. With the establishment of the CETA training program contractors in the program were required to file with the CETA Project Director, either a contractor voucher (a copy of which is annexed hereto as Exhibit "8") or time cards for each CETA participant. These vouchers or time cards reflect the amount of hours a CETA participant worked in a given week and are the basis for the contractors receiving reimbursement for CETA apprentices' wages.

19. Upon the City's request copies of all contractor vouchers and time records submitted by participating contractors from April, 1982 to February, 1983 were provided the City by the Administrator. Under my supervision, Pauline Roundtree, a member of the Law Department's clerical staff, reviewed these records and compared them to manpower records submitted by the JAC. This review disclosed that for eleven contractors, the respondents herein, the hours reported on CETA time records did not match the hours reported on the manpower reports. (Copies of the CETA time records, the manpower reports and a summary comparison of these records are annexed hereto as Exhibits "9", "10" and "11").

20. During the period RAAPO has been in effect plaintiffs have not received complete Manpower Posting Sheets from the JAC. In violation of both the OJ and the RAAPO Monthly Posting Sheets have contained no information regarding the number of apprentices employed by several contractors. (See, OJ ¶s 8 and 21(e)(xii); RAAPO ¶s 20(c)(iv)(B) and 33(K) and Exhibit "10").

21. In order for the JAC to be able to submit complete data for the Monthly Posting Sheets, it is necessary that it obtain such information from individual Local 28 contractors. (See ¶s 17 above). During the previous three years the JAC has failed to take any action, other than request contractors to file the reports, to ensure that contractors who have failed to file with the JAC the necessary manpower reports do so. (See Abdul-Salaam March 18, 1983 letter, Rothberg March 18, 1983 letter and Foy March 28, 1983 letter annexed hereto as Exhibits "12", "13", and "14"). As a result it has been left to the City and the Administrator to bring orders to show cause against contractors who have failed to submit manpower reports. The OJ and the RAAPO clearly state that it is

the JAC's, and not the City or the Administrator's, affirmative obligation to obtain the information necessary to submit complete Monthly Posting Sheets. By failing to do so the JAC has violated this Court's orders.

22. The OJ and the RAAPO require Local 28 to Maintain and submit accurate records regarding the number of white and non-white Local 28 members. (See, OJ ¶s 1 and 2(i); RAAPO ¶ 33(K)). In his August 16, 1982 Memorandum Decision, Judge Werker found that Local 28 had violated the OJ and RAAPO by failing to submit required reports, including membership census. (See, 29 FEP Cases 1146). Local 28's failure to comply with this Court's reporting requirements has continued to date.

23. Recently the City's discovered that membership data which Local 28 has submitted has been inaccurate. These inaccuracies consist of Local 28 listing as non-white two individuals, Jose Marquez and Arthur Kaplan, who until February 28, 1983 it has listed as white. (See Raff March 2, 1983 letter, D'Elia March 7, 1983 letter and Foy March 22, 1983 letter annexed hereto as Exhibits "15", "16", and "17"). The correct racial identity of these individuals, who it is believed have been Local 28 members for several years, could have easily been established some time ago. No clerical error or mistake due to the responsible Local 28 official not having met Mr. Marquez can be claimed. Mr. Marquez, as his name clearly indicates, is, and always has been, Spanish-surnamed. Mr. Kaplan, as his name would appear to indicate, is not non-white and should not be listed as a non-white.

(c)

24. In order to insure the parties have an up-to-date listing of Local 28 contractors and are provided accurate weekly manpower reports on November 20, 1981 the Administrator directed Local 28 to serve all contractors who entered into a contractual relationship with Local 28 or employed JAC apprentices with copies of the OJ and the RAAPO, certified-return receipt requested. (See Exhibit "2"). Copies of the certification cards was to be provided to the parties upon their receipt by Local 28.

25. To date, no proof of service of copies of the OJ and the RAAPO has been filed by Local 28. At least one contractor, Robert

Sinkler of County Sheet Metal, has testified that he was not served with copies of the OJ and the RAAPO. (See Transcript of December 22, 1982 hearing, p. 5-6, annexed hereto as Exhibit "18").

26. A request that Local 28 provide proof of service of the RAAPO and the OJ has resulted in a reply that Local 28's attorney had been "unsuccessful in his attempt(s) in securing proof of service." (See, Foy January 6, 1983 and D'Elia February 28, 1983 letters annexed hereto as Exhibit "19" and "20").

The Relief Sought

27. The City is seeking two basic forms of relief pursuant to its instant motion.

(a) a computerized record keeping system developed and maintained by an independent management firm; and

(b) coercive fines to pay for computerized record keeping.

(a)

28. The Court's August 16, 1982 Memorandum Decision and the instant proceeding point up the necessity of obtaining timely and accurate records. As the Court stated in its Memorandum Decision "compliance with [record keeping and reporting requirements] is absolutely vital to the effective monitoring and implementation of the RAAPO". 29 FEP cases 1146. The concept, embodied in MAAPO (See City Comments regarding MAAPO, p. 17), that the defendants can provide accurate records through Local 28's computer must be seriously questioned. Both the defendants' previous contemptuous acts and their continued unwillingness and inability to provide timely records leads the City to believe that record keeping and reporting functions in this litigation must be assumed by an independent firm.

(b)

29. This Court has already stated that coercive fines are necessary "to coerce future compliance with the orders of the court and the Administrator". 29 FEP Cases 1147. Where, as in the instant case, defendants continue to violate the court's reporting and record keeping requirements, the use of coercive fines to pay for independent management of the defendants' records will ensure

future compliance with the court's order.

30. *Costs and Attorneys Fees.* The City also requests that the costs and attorney fees incurred in the prosecution of this motion be taxed against the defendants and the respondents.

Conclusion

31. The evidence establishes that Local 28 of the Sheet Metal Workers' International Association, the Local 28 Joint Apprenticeship Committee, the Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. and the eleven individually-named contractors have violated the decrees of this Court. In so doing they have discriminated against non-whites in violation of outstanding Court orders and in violation of Title VII of the Civil Rights Act of 1964.

WHEREFORE, to ensure that such violations cease and to compensate those non-whites who have been injured as a result of these violations, the City respectfully requests that this Court grant its motion, find that Local 28, the Local 28 JAC, the Contractors' Association and the eleven individually named contractors have violated this Court's orders, and award the relief requested herein and any other relief the Court may find just and proper.

CHARLES FOY
Assistant Corporation Counsel

Sworn to before me this
11th day of April 1983

United States District Court Southern District of New York

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION and
THE CITY OF NEW YORK,

Plaintiffs,

— against —

LOCAL 638 ... LOCAL 28 OF THE SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION, LOCAL
28 JOINT APPRENTICESHIP COMMITTEE ... SHEET
METAL AIR-CONDITIONING CONTRACTORS'
ASSOCIATION OF NEW YORK CITY, INC., et al.,

Defendants.

MEMORANDUM & ORDER

71 Civ. 2877 (HFW)

HENRY F. WERKER, D. J.

A Modified Affirmative Action Program and order ("MAAPO" or "Plan") has been presented to the court in draft form dated December 17, 1982. The Plan was negotiated by the parties to this action.¹ Its stated purpose is to supersede the Revised Affirmative Action Program and Order ("RAAPO") entered on January 19, 1977 and certain provisions of the Order and Judgment ("O&J") entered on August 29, 1975.

At a hearing held on December 30, 1982, the court-appointed Administrator ("Administrator") stated that he was opposed to MAAPO. The court informed the Administrator and the parties that it would accept any written comments they had on MAAPO before deciding whether to approve or disapprove the Plan. As a

result, the court has read and considered the letters dated January 12, 1983 and February 18, 1983 submitted by the Equal Employment Opportunity Commission ("EEOC"), the comments of the City of New York ("City") dated February 7, 1983, the December 29, 1982 letter submitted by the State of New York ("State") and its memorandum in support of MAAPO dated February 7, 1983, the Administrator's objections to MAAPO dated January 6, 1983, the defendants' response to those objections dated February 7, 1983 and the Administrator's reply to the parties' comments on MAAPO dated February 17, 1983.

The EEOC, one of the primary plaintiffs in this action, does not approve of MAAPO. The City, another plaintiff, originally took a position of "nonopposition." In a letter dated April 7, 1983, however, the City stated that it was opposed to the Plan. The State approves the Plan. Although the purpose of RAAPPO and the O&J was to put an end to discrimination in the recruitment, selection, training and admission to membership in Local 28 of the Sheet Metal Workers' International Association ("Local 28") or its apprenticeship program, the record of this case discloses a consistent intent on the part of defendants to evade, avoid and disobey these orders. In the court's opinion, MAAPO is further evidence of this policy. It therefore, as a whole, is disapproved.² Following are the court's comments and suggestions on an acceptable MAAPO, which should be prepared in conjunction by both plaintiffs and the Administrator and submitted to me on notice of motion for approval.

Section 1

This section should be revised to reflect the appropriate names of all of the parties.

Section 2

This section should be revised to include not only Local 28 as it existed before its merger with Locals 10, 13, 22, 55 and 559, but also to embrace those Locals that have merged with Local 28. In other words, the effect of the merger should not be left open; any Local that has merged with Local 28 is to be covered by the provisions of the Plan. In this regard, it is the court's intention that all

Locals that have merged with Local 28 and, consequently, all contractors now doing business with Local 28 be bound by the provisions of any Plan approved by the court, as well as the O&J and RAAPPO.

Section 3

While the first paragraph of section 3 is acceptable, the goal of MAAPO must be measured as against the total membership of Local 28 and any Locals that have merged with it. Thus, the first sentence of the second paragraph should be revised. In drafting this revision, the statements of the Second Circuit in *E.E.O.C. v. Local 14, International Union of Operating Engineers*, 553 F.2d 251 (2d Cir. 1977) should be considered. The fourth paragraph should be redrafted to indicate that MAAPO will not terminate automatically upon a showing that Local 28's non-white membership has reached 29% but that it will terminate only after approval by the court on motion of defendants.

Sections 4-9

These sections are approved in principle. The reason for such approval is that the court finds that the quotas established by these sections are necessary only because of defendants' egregiously poor performance over the past six (6) years. Unfortunately, it is apparent that the goal established in the O&J never will be reached if this temporary method of access for nonwhites is not employed. The court adds, however, that, in its opinion, a "hands-on" test should be used. With respect to paragraph 4(e), the term "Executive Board of Local 28," is deleted. The "Board" should be composed of three (3) persons: one (1) designated by plaintiffs, one (1) designated by defendants and one (1) designated by the court. Any further use of the term "Executive Board" in the Plan should be construed in this light. Finally, with respect to the last sentence of section 5, the word "Arbitrator" should be eliminated and the word "Administrator" substituted. The court is aware that the term "Arbitrator" appears in several sections of MAAPO and directs that, wherever this word appears, the term "Administrator" be substituted.

Section 10

This section is approved with the following revisions. Employers should be required to use a ratio of one (1) apprentice to four (4) journeymen unless the employer can supply the union its reasons for not doing so in writing, subject to the penalty of perjury and if plaintiffs consent to the abandonment of such procedure. In this regard, it is the court's intention that an employer may hire seven (7) journeymen but still would be obligated to hire at least one (1) apprentice. The court notes that these steps are a minimum. If this methodology is not successful, plaintiffs are authorized to request the taking of additional steps.

Section 11

This section is approved except that the provision for the reduction for the number of apprentices to be indentured should be permitted only by the approval and consent of plaintiffs. As noted above and as will not be mentioned further, there will be no Arbitrator for this Plan. Thus, any disputes should be referred to the Administrator for resolution.

Section 12

Section 12 is approved.

Section 13

Section 13 is approved, but the words "make every effort" contained in the second sentence should be deleted.

Section 14

Section 14 is approved.

Section 15

This section should be eliminated.

Section 16

This section is approved.

Section 17

This section is approved.

Section 18

This section is approved except that, in paragraph 18(a), the word "reduced" should be changed to "paid," and the last sentence of paragraph 18(b) should be eliminated.

Section 19

The provision contained in paragraph 19(a) for "the lowest possible" should be changed to a ratio of one (1) to four (4). Furthermore, if there is to be an Appendix E as stated in paragraph 19(b), it will have to be approved by plaintiffs and the court.

Section 20

Section 20 should be revised to read as follows:

20. Local 28 may not issue "permits" or "identification slips" unless
 - (a) a written request has been made to the plaintiffs justifying the issuance. (Appendix F is insufficient.) Such request must be certified and affirmed by a union officer and the contractor subject to penalty for perjury;
 - (b) Plaintiffs have consented in writing to the issuance;
 - (c) If plaintiffs refuse to consent, they must state their reasons for doing so in writing; and
 - (d) Any part aggrieved by actions taken under this provision may apply to the Administrator for resolution.

Sections 21-29

These sections are approved, but, in paragraph 29(b), the provision for "a reasonable extension of time" should be revised to read "a reasonable extension of time not to exceed ten (10) days."

Sections 30-32

These sections are approved.

Section 33

Paragraph 33 (a) should be redrafted to designate David Raff as the Administrator of the Plan. As to his fees, he should be paid at the rate of \$150 per hour plus expenses.

Section 34

This section is approved except that the phrase "question of interpretation" in paragraph 34(a) should be deleted as should the last sentence of this paragraph.

Sections 35-37

These sections are disapproved. In fact, the court finds it inconceivable that defendants would attempt to request financing for compliance with MAAPO. As is clearly demonstrated by the record in this case, defendants flagrantly have abused the prior orders of this court. For example, in a decision dated August 16, 1982, the court was compelled to hold defendants in contempt of court for failing to comply with the O&J and RAAPO and fined defendants \$150,000 plus reasonable attorney's fees. Although the court stated that the fines should be placed in a fund and used to forward the goals as set forth in the O&J RAAPO, nowhere did the court mention or intend to suggest that defendants were to be rewarded if they complied with the goals of this action as contained in the O&J and RAAPO. Indeed, the court suggested that a further coercive fine might be necessary. Accordingly, the court directs that, if they have not already done so, defendants forthwith deposit \$150,000 into the court to the credit of this action and designate the Manhattan Savings Bank and the Dollar Savings

Bank as the depositories for the fines assessed against them in this action. Both plaintiffs and the Administrator are to administer this fund. At such time as defendants apply to this court for relief on the ground that they have complied with the O&J and RAAPO and successfully move for the termination of MAAPO, the court will consider the appropriateness of releasing to defendants some or all of any monies that are remaining.

Section 38

This section is approved. If plaintiffs wish to contribute attorney's fees to the fund, they will be accepted.

Section 39

Apart from paragraph 39(a), this section is approved. Paragraph 39(a) should be revised to provide that all Locals that have merged with Local 28 be sent a copy of MAAPO.

Section 40

This section is approved.

CONCLUSION

It is the court's intention that plaintiffs shall be the parties responsible for monitoring defendants' activities and initiating action to insure compliance with MAAPO, as and when it is approved by the court. While this has not been the case in the past, it will be in the future. Consequently, it is plaintiffs' duty to assign competent personnel to perform these tasks. The Administrator hereby is relieved of those functions.

Plaintiffs and the Administrator are directed to submit a revised Plan that will accord with the provisions and goals of the O&J, RAAPO and the court's comments and suggestions as set forth herein, as well as an appropriate procedure for the utilization of the fund within thirty (30) days from today.

SO ORDERED.
DATED: New York, New York
April 11, 1983

U.S.D.J.

NOTES

1. The court-appointed Administrator was not a party to the negotiations.
2. Although the court has indicated its approval of several individual sections of the Plan, the court notes that its approval is in principle only and not in haec verba because, in the court's opinion, many details of the items covered in the approved sections have not been adequately addressed.

DEFENDANTS COMMENTS ON ADMINISTRATOR'S OBJECTIONS TO MAAPO

INTRODUCTION

This document sets forth the Defendants comments on the Administrator's objections to the proposed Modified Affirmative Action Program and Order.

PURPOSE AND CONCEPT OF MAAPO

In 1975, under the jurisdiction of this Court, the Sheet Metal Industry in New York City began to operate pursuant to the terms of an Affirmative Action Program which set out methods and procedures for the industry to follow in connection with all significant aspects of the Defendants operations, including among other things, recruitment and selection of apprentices and journeymen and extensive record-keeping requirements. This program was modified in January of 1977.

It is clear to all involved that the industry has fallen short of the objectives set forth in the Affirmative Action Programs, namely, the achieving of 29% minority participation in the Union. There are various reasons why this has occurred.

The significant, if not the sole manner in which additional minorities can participate is at the time that there are jobs available for them in the industry. We learned early on that taking people into an industry for which there are no work opportunities was counter-productive. Unfortunately, during the period since the start of the Affirmative Action Program, the Sheet Metal Industry in New York City as well as the construction industry in general have suffered severe down turn which resulted in massive unemployment of journeymen and apprentices. This situation did not ease until 1981. Over that period, the industry, which at one time had 3,500 journeymen working and 550 apprentices, suffered such a set back that in 1978, only 800 journeymen were working and less than 75 apprentices had jobs at that time. It is difficult, if not impossible, to significantly increase minority participation in an industry that is suffering severe

economic cutbacks as was experienced in this industry over most of the period of the Affirmative Action Program.

We also encountered other problems that were unexpected when the Affirmative Action Program was first promulgated. For example, we did not anticipate that the Journeyman Hands-On Test would substantially increase the number of whites in the Union and bearly increase the number of minorities. This was the case for all the journeyman tests given during this period. The same is true with regard to the Apprentice Test. Although this examination had been validated in accordance with EEOC guidelines, each test showed adverse impact with the result being that a higher percentage of whites were indentured than minorities. These were two of the aspects of the Affirmative Action Program that experience has shown us do not help to produce the desired objectives.

Over the years, interim variations have been attempted by the parties with the hope of achieving the desired results. For example, at the Defendants request, four classes were indentured without a test on a ratio basis. This has proven quite effective in meeting the objectives of the Affirmative Action Program. We have also utilized various recruitment approaches for gaining applicants to both the apprentice program as well as directly into journeyman status. We now have the benefit of those various approaches.

At the request of the Defendants, the parties met to see if they could come up with an Affirmative Action Program that had the best potential for meeting the objectives as set forth by this Court. The Defendants approached these discussions in an atmosphere of cooperation and realism. It serves no useful purpose to anyone to have an Affirmative Action Program that does not and cannot work. On the contrary, it serves everybody's benefit to have an Affirmative Action Program that can be implemented in a realistic and practical manner and has the best hope of achieving the objectives required. This is what the parties have accomplished with MAAPO. This is the first time that the Defendants and the Plaintiffs were able to come to agreement on such

a broad and all encompassing program. The agreement represents a constructive spirit of cooperation that can and will make this MAAPO work. We have had the benefit of over seven years of operation under an Affirmative Action Program. We have used that background and our collective understandings of the industry and the directives of the Court in putting together MAAPO. Collectively, we ask the Court to give us the opportunity to make this MAAPO work in an atmosphere of agreement and common cause. We will now address specific areas of MAAPO.

ROLE OF THE ADMINISTRATOR

All the parties concede that the Affirmative Action Program that had been in existence since 1975 did not work. Throughout this period of time, there was an active and involved Administrator in every phase of the proceedings. That Administrator now wishes to absolve himself from any of the shortcomings of both the Affirmative Action Program as written, as well as the difficulties encountered in its implementation.

It is interesting as well as distressing to read the Administrator's analysis indicating that for an extensive period of time, RAAPO was not being complied with by the Defendants. He dates their non-compliance as early as January, 1979. He does not specify, however, the manner in which he claims RAAPO was being violated. In all the years that he has been the Administrator, since the summer of 1975, never once has he used the authority vested in him to find any fault with the Defendants' compliance. It would seem that if in 1979, as the Administrator states: "It was evident that RAAPO was not being complied with.", why didn't he issue specific orders insuring compliance; why didn't he go to Court for enforcement; why didn't he bring proceedings against the Defendants, and so on.

The Administrator reports that as Administrator, the Court specifically elected to grant him broad authority and ability of independent action. The Administrator defends the concept and role of the Administrator and wishes to continue the role with broad, independent powers, and yet at the same time, complains

of Defendants and Plaintiffs alleged inaction over seven years. The Administrator cannot have it both ways. There is no question that he has been ineffective while being a tremendous financial burden to the Defendants. To date, the Administrator has collected from the Defendants the sum of \$245,803.00 for his services.

If there was a lack of compliance by the Defendants, why didn't the Administrator do something about it. If the Administrator felt that RAAPO could not work as such, why didn't he make specific suggestions, other than suggestions as to interim goals.

The role of Administrator may have served a useful purpose in the initial stages of RAAPO when many new areas had to be explored and developed. Procedures had to be adopted for the implementation of various provisions of RAAPO. All this work has now been completed; all the groundwork and the foundation for the entire program has been laid over the past seven years. That role of the Administrator is no longer necessary or required. In fact, MAAPO is self-executing and there is no need for the continuing oversight of an Administrator as originally conceived. The parties still have all their rights to go to the Court, if in fact the Affirmative Action Program is not being complied with.

It is interesting that Mr. Raff now seeks to expand the Administrator's role to go beyond the reaching of the goal. He would continue his role and i.e., the Court's role, forever. He specifically states that even when the goal is reached, he would have "serious problems" about eliminating the arbitrator and monitor at that time. The Administrator must realize that in this type of litigation, he is not a Federal District Judge with lifetime tenure, which is what he appears to be seeking to do.

Finally, it should be noted that the Court originally permitted the parties the opportunity, for ninety (90) days, to draft an Affirmative Action Program without an Administrator. When this appeared to be unsuccessful, it was the Defendants who came forth and advised the Court accordingly. Now the parties have prepared a MAAPO without an Administrator, and it is respectfully urged that it be approved by the Court.

A. USE OF AN APPRENTICE TEST

Much to the Defendant's surprise, the Administrator now proposes the continued use of an entrance exam as the screening mechanism for entrance into the Apprentice Program. He seems to think, without any supporting evidence, that if in fact there was a different kind of recruitment, or some sort of pre-test orientation, that that would overcome the history of adverse impact of these tests. He is incorrect when he states that the test that showed adverse impact did not have any tutorial or pre-screening approach. The most recent outreach program for the June, 1982 apprentice test had a significant and well organized pre-test orientation and tutoring for the minorities. It did not help the results.

To overcome the problem of the adverse impact of the test, and based upon the actual experience of four classes that were selected by another method, MAAPO contains a defined and standardized screening mechanism, without a test. It will give a preference for entrance to those people who have prior experience or vocational training. When the Administrator hypothetically poses, why couldn't a person who has completed a sheet metal program in a vocational high school, enter as an apprentice without a test, the answer is, that is precisely what MAAPO provides for. When the Administrator speculates that an individual need not go through that process of a test if his educational work experience indicates competency above entry level, that is exactly what MAAPO provides. MAAPO sets forth a fair and equitable method of meeting the objectives of an Affirmative Action Program.

B. THE RATIO QUESTION

The Administrator has now reversed his position and suggests that a fixed ratio be utilized in MAAPO for assigning of apprentices to employers. It is difficult to comprehend what has transpired to change his fixed position over the years, other than the reading of a Department of Labor document that was first prepared in 1947, and enclosed in the 1955 edition of a booklet entitled, "National Apprenticeship & Training Standards." In addition, the Administrator cites a few collective bargaining

agreements that mention a ratio. What the Administrator does not appear to understand is that ratios in collective bargaining agreements do not represent a mandatory approach, but rather are bargained for by unions in order to insure that employers do not demand more apprentices ("cheap labor") than that ratio would permit. In point of fact, in all the locals cited, none of them have the stated ratio in practice. So actually nothing really has changed since the Administrator conducted relevant hearings in 1976 and determined that a ratio was inappropriate. Those same reasons still exist.

There are many contractors in signed agreement with Local 28 that are not in the position to train apprentices because of the nature of the work they do. For example, there are many small roofing contractors who use sheet metal workers for miscellaneous sheet metal work incidental to the installing of roofs; there are a number of testing and balancing contractors who are basically engineers who test and balance air conditioning systems after they are installed; there are a number of specialty contractors who manufacture particular products which do not lend themselves to proper apprentice training; there are a number of acoustic ceiling contractors who only use sheet metal workers when installing metal pan ceilings and accordingly, do not lend themselves to the training of apprentices. In point of fact, there are more of these types of contractors than those that do employ apprentices.

A second factor has been the problem of directing employers to employ more people than they need. It has been held by the Court that unless the employer is seeking to circumvent the Court's order, it can for business and economic reasons, choose not to hire a particular employee at a particular time and further, it cannot be directed to lay off white employees and replace them with minority employees. Given all this, the use of ratios becomes an arbitrary, artificial, cumbersome and futile approach that serves no purpose. The MAAPO sets forth a very positive and direct approach to maximizing job opportunities.

C. TRAINEES

The Administrator totally misreads MAAPO in regard to Executive Order 50 and a trainee program. MAAPO provides an effective solution to this situation through two approaches. The employer can participate in a training program with an agency or group who has received the approval of the Bureau of Labor Services (permitted by Executive Order 50) or the industry as a whole may set up its own training program, with more stringent requirements. It would, in effect, not be outside of the apprentice program but would be equivalent to and integrated into the apprentice program. There was never any intent to have a "Separate but equal approach to trainees." It was always the position of all parties that all trainees, once taken into the program, would become integrated into the apprentice program. The Administrator knows this; this is the very procedure that has been applied to the advanced apprentices and CETA people. There have never been any problems. Accordingly, the relevant provisions of MAAPO are the best approach for achieving compliance with the Mayoral Executive Order.

The Administrator raises additional questions concerning whether or not it applies to non-city contractors. Obviously, Executive Order 50 applies only to those contractors who are doing work covered by Executive Order 50. There was never any need or intent to go beyond that point.

D. PUBLICITY PROGRAM

We do not understand why the Administrator declares that the publicity of MAAPO is a retreat, and is in effect no program at all. First, MAAPO requires a direct outreach to the vocational and technical schools seeking applicants. Second, MAAPO mandates a mailing to various community organizations that are involved in recruiting people for entry of minorities into the construction trades, and in addition, there is advertising in the minority community and on the minority radio stations so as to advise the non-white community about sheet metal and methods of entry.

E. APPRENTICE TO JOURNEYMAN PROGRESS

The Administrator expresses a concern that we are only taking in numbers, and there is no guarantee of any follow through in the program. He is wrong again. Anyone who completes the four year program is automatically admitted into journeyman status in Local 28. There is no entrance test or any other qualifications aside from initiation fees which have been addressed in other sections of MAAPO. Secondly, in 1981, and in early 1982, four classes were indentured without an apprentice test, using criteria similar to what is being proposed in MAAPO. In those four classes, 192 were indentured (105 white, 87 minority) and 175 are still in the program. Of the 175, 96 are white and 79 are non-white. This has maintained the exact ratio of 55 - 45 of those who were originally indentured. Those who remain in the program appear to be doing as well as those who came into the program through the test in previous years. Further, the proposed MAAPO calls for the replacement of those who drop out during the first year so as to maintain the racial composition of that class. Our experience is that most of the apprentices who do drop out, do so during their first term and MAAPO provides an effective mechanism to deal with this occurrence.

F. RECORD KEEPING

The Administrator's proposal and comments regarding the record keeping is somewhat baffling. It appears that the Administrator likes technology and wishes to take and make this into a major statistical and computer based system. It is really not necessary. Even a cursory reading of MAAPO demonstrates that all record keeping that is reasonably required to properly monitor and oversee the program is provided for in a timely and effective fashion. The Administrator has not cited any particular record keeping that has not been included in MAAPO and talks in very vague, generalized terms about exploding record keeping. This is sheer nonsense and he is making out a lot more than really exists in this situation.

G. USE OF THE FUND

The parties attempted to set down programs in accordance with the Court's direction regarding the use of the Fund. We think we have done that. We have provided for a simple mechanism to put in additional programs that would be in conformance with the objectives of the Fund. Some of Mr. Raff's suggestions are worthy and could readily be incorporated into the existing programs. That is why MAAPO with its flexibility in this regard, is the most progressive approach.

H. THE ARBITRATOR

Based upon a track record of seven lean years of achievement, it is evident that an administrator is unnecessary and undesirable. MAAPO substitutes an arbitrator for dispute resolutions regarding MAAPO, raised by the parties or interested persons, with appeal to the Court. This provision covers all disputes concerning the operation of MAAPO, its interpretation, and any claimed violations. The Administrator's apparent pejorative references to labor arbitrators is misguided and misplaced. The arbitrator will be bound by the provisions of MAAPO and the orders of the Court, and he will draw the essence of his authority and power from MAAPO and the Court. It is proposed that the designation of the arbitrator be reserved for the Court. However, the Defendants respectfully suggest that the Court consider for such appointment such eminently qualified and publicly respected persons as Judge Marvin Frankel, Judge Harold Tyler, and Honorable Basil Paterson.

JA-38j

CONCLUSION

It is hereby respectfully requested that the Court approve the Modified Affirmative Action Program and Order as submitted.

Dated: Brooklyn, New York
February 7, 1983

RESPECTFULLY SUBMITTED,

WILLIAM ROTHBERG, ESQ.
Attorney for the Employers
Association and Co-Counsel to the JAC

EDMUND DELIA, ESQ.
Attorney for Local 28 and
Co-Counsel to the JAC

SOL BOGEN, ESQ.
Of Counsel

The Decision of the District Court for the
Southern District of New York Entered
August 19, 1982 Holding Petitioners
in Contempt is reprinted at A-149 of the
Appendix to the Petition for Certiorari

Plaintiffs' Motion For Contempt Dated April 16, 1982.

**United States District Court
Southern District of New York**

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs,

— against —

LOCAL 638 ...
LOCAL 28 of the SHEET METAL WORKERS' INTER-
NATIONAL ASSOCIATION, LOCAL 28 JOINT AP-
PRENTICESHIP ... SHEET METAL AND AIR-
CONDITIONING CONTRACTORS' ASSOCIATION OF
NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

— against —

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

— against —

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

THE CITY OF NEW YORK, and NEW YORK STATE
DIVISION OF HUMAN RIGHTS,

Plaintiffs,

— against —

ABBOTT-SOMMER, INC., A.A.B. CO. SHEET METAL
CO., ACOUSTECHS SHEET METAL CORP., AIR
DAMPER MFG. CORP., AIRITE VENTILATING CO.
INC., ALLEN SHEET METAL WORKS, INC., ALLIED
SHEET METAL WORKS INC., ALPINE SHEET METAL
& VENTILATION, CO., INC., ARCHER SHEET METAL
INC., ARROW LOUVER & DAMPER CORP.,
BAYCHESTER ROOFING & SHEET METAL, INC.,
BRUMAR INC., BUNKER INDUSTRIES, INC., CENTER
SHEET METAL, COASTAL SHEET METAL CORP.,
COLONIAL ROOFING CO., INC., COLUMBIA VEN-
TILATING COMPANY, INC., CONTRACTORS SHEET
METAL, INC., CRAFT SHEET METAL WORKS, INC.,
DELTA SHEET METAL CORP., DORITE SHEET
METAL, ESSEX METAL WORKS, INC., FASANO
SHEET METAL CO., INC., J.J. FLANNERY, INC.,
GENERAL FIREPROOF DOOR CORP., GENERAL
SHEET METAL WORKS, INC., GENTLEMAN SHEET
METAL LIMITED, GLOBAL SERVICES & INSTALA-
TION, INC., HARRINGTON ASSOCIATES, INC.,
HOWARD MARTIN CO., INC., IMPERIAL DAMPER &
LOUVER CO., INDUSTRIAL METAL FABRICATORS,
DARO SHEET METAL CORP., KAY ROOFING COM-
PANY, INC., KENMAR SHEET METAL CORP., K.G.
SHEET METAL, INC., L.P. KENT CORP., MODERN
KITCHEN EQUIPMENT CORP., A. MUNDER & SON,
INC., NATIONAL ROOFING CORP., NATIONWIDE
ACOUSTIC FOIL NOISE CONTROL PRODUCTS, NEW
YORK SHEET METAL WORKS, INC., W.H. PEEPELS
COMPANY, INC., PENTA SHEET METAL CORP.,
PERFECT CORNICE & ROOFING CO., INC.,
PHOENIX SHEET METAL CORP., DANIEL J. RICE,
INC., HUGH RICHARDS ASSOCIATES, INC., ROMAR

SHEET METAL, INC., JOHN SCHNEIDER ROOFING CONTRACTORS, INC., SHAPIRO EQUIPMENT CO., INC., SIMPSON METAL INDUSTRIES, INC., SOBEL & KRAUS, INC., SPRINGFIELD SHEET METAL WORKS, INC., STEELTOWN SHEET METAL & IRON WORKS, INC., SUMAR SHEET METAL, INC., A. SUNA & COMPANY, INC., LOUVER LITE CORP., ASCO ROOFING CORP., SUPREME FIREPROOF DOOR CO., INC., SWIFT SHEET METAL CO., INC., SWIFT SHEET METAL CORP., TEMPCO COMPANY INC., HERMAN THALMAN CO., TRIANGLE SHEET METAL INC., TROPICAL VENTILATING CO., INC., TUTTLE ROOFING COMPANY, INC., UNIVERSAL SHEET METAL CORP., UNIVERSAL ENCLOSURES, WOLKOWBRAKER ROOFING CORP., AIR-BALANCING & TESTING CO., AIR CONDITIONING & BALANCING CO., INC., ALL TYPES STACKS & CHUTES, AMSCO SYSTEMS (AMERICAN STERILIZER), ARCHITECTURAL ACOUSTICS, ASSOCIATED TESTING & BALANCING INC., BAL TEST CORP. CHIMNEY & CHUTES CO., CIRCLE ACOUSTICS CORP. COLLYER ASSOCIATES, INC., EASTERN ACOUSTIC CORP., EFFICIENT TOWERS INC., ENSLEIN BLDG. SPECIALTIES, INC., ESS & VEE ACOUSTICAL CONTRACTORS, INC., FISHER SKYLIGHTS INC., INTERNATIONAL TESTING & BALANCING CORP. JACOBSON & COMPANY, INC., JERIMIAH BURNS INTERIOR SYSTEMS, INC., JOHNSON CONTROLS, MECHANICAL BALANCING CORP. JOHN MELEN, INC., MORSE BOULGER, INC., R.H. McDERMOTT CORP., NAB TERN CONSTRUCTION, NATIONAL ACOUSTICS, QUALITY ERECTORS, WILLIAM J. SCULLY ACOUSTIC CORP., SUPERIOR ACOUSTICS, SYSTEMS TESTING & BALANCING, INC., U.S. CHUTES, WETZEL CONTRACTING CORP., WILLOPEE ENTERPRISES, WOLFF & MUNIER INC., APEX CHUTES & MANUFACTURING, INC., MODERN SHEET METAL WORKS INC., CALMAC-MANUFACTURING CO., COOLENHEAT, DE SAUSSURE EQUIPMENT CO., INDUSTRIAL

ACOUSTICS CO., INC., INDUSTRIAL IRON & STEEL, INSUL-ACOUSTIC/BERMA CORP., JERSEY STEEL DRUM MFG. CORP., KENCO PRODUCTS CORP. MARATHON INDUSTRIES INC., PHOENIX STEEL CONTAINER CORP., RICH MANUFACTURING CORP., STERNVENT.,

Respondents.

71 Civ. 2877

(HFW)

PLEASE TAKE NOTICE, that upon the annexed affidavits of Charles R. Foy and Sheila Abdus-Salaam, sworn to the 16 day of April, 1982 respectively, the City of New York and the New York State Division of Human Rights will move this Court at the Courthouse at Foley Square, New York, New York on June 10, 1982 at 10:00 a.m. or as soon thereafter as counsel may be heard for an order citing defendants and respondents for civil contempt and granting the following relief:

1) require defendants to pay compensatory fines in the amount of \$182,500 (\$100 dollars a day from July 1, 1977 through June 30, 1982);

2) require defendants to pay coercive fines in such amounts as this Court deems appropriate to ensure prompt compliance with this Court's orders;

3) establish a central job reporting system which would require, *inter alia*, the respondent contractors to notify Local 28 of each Local 28 member hired, and to state for each such hire: name, address, phone number, race, contractor's name, and length of job for which hired; and which would require the union to report quarterly to plaintiffs and the Court on all such new hires;

4) require the defendants to conduct an effective publicity and outreach campaign;

5) enjoin enforcement of the age requirement in the present collective bargaining agreement because of its discriminatory impact on non-whites;*

6) increase the non-white union membership goal to reflect the increased non-white minority labor pool;

7) award the City and State their attorneys fees and costs; and

8) award such other and further relief as will ensure prompt compliance with this Court's orders and equal employment opportunities for non-whites in the sheet metal trade and industry.

*For purposes of this case the term "non-whites" is used to refer to Black and Spanish surnamed individuals. 401 F. Supp. at 470, n. 1.

Dated: New York, New York
April 16, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for the State
Division of Human Rights
Two World Trade Center
Suite 46-57
New York, N.Y. 10047
Tel. (212) 488-7510

DEBORAH BACHRACH
Bureau Chief, Civil Rights Bureau
Assistant Attorney General

SHEILA ABDUS-SALAAM
Assistant Attorney General
of Counsel

FREDERICK A. O.
SCHWARZ, Jr.
Corporation Counsel
Attorney for the City of New
York
100 Church Street
Room 6-C-14
New York, N.Y. 10007
Tel. (212) 566-2309/2191

JUDITH A. LEVITT
CHARLES R. FOY
MERYL R. KAYNARD
Assistant Corporation Counsels
of Counsel

The Affidavit of Charles R. Foy in Support of
Motion for Contempt is reprinted
at A-447 of the Appendix to the
Petition for Certiorari

The Affidavit of Sheila Abdus-Salaam
in Support of Motion for Contempt
is reprinted at A-468 of the Appendix
to the Petition for Certiorari

PLAINTIFFS' EXHIBIT 51 IN CONTEMPT I PROCEEDING
—AGE DISTRIBUTION OF LOCAL 28 MEMBERS,
WHITES AND NON-WHITES,
AS OF DECEMBER 31, 1980

DISTRIBUTION OF SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION, LOCAL 28
MEMBERS BY RACE AND AGE: 1980

	<u>All Members</u>	<u>Non-white</u>	<u>White</u>
<20	17	0	17
20 - 24	94	21	73
25 - 29	125	39	86
30 - 34	276	44	232
35 - 39	264	28	236
40 - 44	278	10	268
45 - 49	239	1	238
50 - 54	189	7	182
55 - 59	138	1	137
60 - 64	89	1	88
65 +	11	0	11
<u>TOTAL</u>	<u>1720</u>	<u>152</u>	<u>1568</u>

SOURCES: 1981 Pension Fund Annual Report, Table 6, Page 12
Membership Files and Ledgers
Pension Fund Files
"Green Cards"
JAC Apprenticeship Records

Proportion of Whites 50 Years of Age and Over: 0.251
Proportion of Non-whites 50 Yrs. of Age and Over: 0.059

Number of Standard Deviations between These Proportions: 5.65
Probability: Less than 1 in 10,000

Conclusion: The proportion of whites 50 years of age and over is significantly greater than the proportion of non-whites 50 years of age and over.

PLAINTIFFS' EXHIBIT 52 IN CONTEMPT I
PROCEEDING—AGE DISTRIBUTION OF ALL METAL
CRAFTSMEN IN NEW YORK CITY

DISTRIBUTION OF METAL CRAFTSMEN
EXCEPT MECHANICS¹
BY AGE AND RACE
NEW YORK SMSA:² 1970

<u>Age</u>	<u>All Workers</u>	<u>Non-white</u>	<u>White</u>
16 - 17	73	0	73
18 - 19	394	56	338
20 - 24	1,992	328	1,664
25 - 29	2,914	709	2,205
30 - 34	2,709	653	2,056
35 - 44	6,238	1,128	5,110
45 - 54	7,933	712	7,221
55 - 59	2,954	222	2,732
60 - 64	2,370	82	2,288
65 +	1,122	69	1,053
<u>TOTAL</u>	<u>28,699</u>	<u>3,959</u>	<u>24,740</u>

SOURCE: United States Census of Population, Volume 34D, Table 174.

Proportion of Whites 50 Years of Age and Over: .3914

Proportion of Non-whites 50 Years of Age and Over: .1841

Number of Standard Deviations between these proportions: 25.1841

Probability: Less than 1 in 10,000

Conclusion: The proportion of whites 50 Years of Age and Over is significantly greater than the proportion of Non-whites 50 Years of Age and Over.

¹ Data limitations required us to derive this category of Non-whites by adding the category labelled "Machinists" to the category labelled "Metal Craftsmen, except Mechanics and Machinists."

² "SMSA" denotes Standard Metropolitan Statistical Area. The New York SMSA includes New York City, Rockland and Westchester Counties (New York), and Bergen County (New Jersey).

Census Report on or about April 12, 1982 from Wilton to Raff

PLAINTIFFS' EXHIBIT 45 IN CONTEMPT I
PROCEEDING — LETTER FROM WILTON TO RAFF

Sheet Metal Workers' International Association



Local Union No. 28-AFL-CIO

1790 BROADWAY • NEW YORK, N.Y. 10019 • (212) 541-62

David Raff, Esq.
49-51 Chambers Street
Room 220
New York, New York 10007

Re: E.E.O.C. and City of New York

vs.
Local 28, et. al.

Dear Mr. Raff:

In accordance with the provisions of Paragraph 34(b) of RAAPO the following data, as of April 12, 1982, is submitted concerning Local Union 28 (New York City).

		White	Non-White	% of Non-White
Journeyman	* 1,975	1,853	122	6%
Apprentices	** 291	169	122	42%
TOTAL	2,266	2,022	244	11%

*Includes 5 white and 3 non-white journeymen in Pike Industries—NLRB certification.

**Includes 5 non-white and 2 white apprentices from Pike Industries and 12 CETA people.

Very truly yours,

Daniel Wilton
Financial Secretary-Treasurer

DW: pf

cc: Charles Foy, Esq.
✓ Sheila Abdus-Salaam, Esq.
Sandy Hom, Esq.
William Rothberg, Esq.

E 498

PLAINTIFFS' EXHIBIT 46 IN CONTEMPT I PROCEEDING—CONTRACT
FOR ON-THE-JOB TRAINING/APPRENTICE TRAINING



STATE OF NEW YORK
DEPARTMENT OF LABOR
CONTRACT FOR ON-THE-JOB TRAINING/APPRENTICE TRAINING

JOB
SERVICE

RECEIVED
FEB 17 1981
DEPT. OF LABOR
J.E.D. OFFICE

CENTRAL OFFICE USE ONLY
P. No. _____
AT No. 10485
ATP Code 15-201
Effective Date of AT 1-1-82

☒ Apprenticeship
☐ CETA ☐ WIA ☐ SMTA ☐ OTHER

Name of Employer/Sponsor: SHEET METAL WORKERS' L. U. #28
Address: 34-14 64th ST., WOODSIDE, NY 11377 Queens
(Number & Street) (City) (Zip Code) (County)

3a. Phone: 212 / 478-2571 (Area Code) 3b. SIC Code: [] [] [] [] 3c. D.O.T. Code: [] [] [] [] [] [] [] [] (AT Only)

4. Occupation or Trade: SHEET METAL WORKER (AT Only) 5. Length of AT Program: 4 () (months)

6. No. of Employees: [] (AT Only) No. Journeymen: [] (AT Only) No. Apprentices: [] (AT Only) 7. AT Rate: [] (AT Only)

8. Minimum Journeymen Rate \$ 14.55 per hr. 9. Effective Date of Wages: 01-01-81 (AT Only) 10. Probationary Period: [] (AT Only) months

11. PROGRESSION OF WAGES FOR EACH PERIOD: (AT Only of 8 months/1000 hours)

1ST	2ND	3RD	4TH	5TH	6TH	7TH	8TH				
40%	45%	50%	55%	60%	65%	70%	80%				

12a. Date OJT Contract Commenced: _____ 12b. Date OJT Contract Terminated: _____

13. (If an On-The-Job Training Contract the contractor shall provide the training described herein and in strict accordance with the following attached documents which are part of this contract:

Part I. On-The-Job-Training Program Data consisting of _____ pages.
Part II. General Provisions consisting of _____ pages.
Part III. _____ consisting of _____ pages.

14. Contract payments will be made to the Contractor in accordance with the provisions in the attachments hereto upon the receipt of a properly prepared voucher and upon audit by the State Comptroller.

15. ☐ Check here if any training under this contract is to be carried out by subcontractors. The requirements and provisions of this contract must be included in any subcontract pursuant to the prime contract and it shall be the duty and obligation of the prime contractor to assure that the conditions enumerated herein are being complied with by all subcontractors to whom this prime contract pertains.

16. If Apprenticeship Training, the Employer/Sponsor agrees to comply with the provisions on the attached form JT-400.

17. Signature of Employer/Sponsor: _____ 18. Signature of Union Representative: _____
ROBERT SCHULTER, COORDINATOR
Att Name & Title: _____ Att Name & Title: _____
19. Signature—New York State Department of Labor: _____ FEB 20 1981

ATTORNEY GENERAL'S APPROVAL: _____ COMPTROLLER'S APPROVAL: _____

BEST AVAILABLE COPY

PLAINTIFF'S EXHIBIT 8 IN CONTEMPT I PROCEEDING

Sheet Metal Workers' International Association
Local Union No. 28 AFL-CIO

1790 BROADWAY • NEW YORK, N.Y. 10019 • (212) 541-6200

May 7, 1981

David Raff, Esq.
49-51 Chambers Street
Room 220
New York, N.Y. 10007

Re: REOC and City of New York
V.
Local 638 ... Local 28, etc.
71 Civ. 2877 (HFW)

Dear Mr. Raff:

In accordance with the provisions of Paragraph 34 (b) of the revised AAP & O herein below in the census of Local 28's membership as of May 7, 1981.

		White	Non-White	% of Non-White
Journeyman	1922	1825	97	5%
Apprentices	199	132	67	33%
Total	2121	1957	164	7.7%

Very truly yours,

Daniel Wilton
Financial Secretary-Treasurer

DW:ibp
opeiu/153

cc: Ricardo Montano, Esq.
Ellen Fishman, Esq.
Arnold D. Dleischer, Esq.
William Rothberg, Esq.

EXCERPTS FROM LOCAL 28 AND JAC'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A CONTEMPT ORDER AND IN SUPPORT OF DEFENDANT'S
MOTION TO TERMINATE THE JUDGMENT ORDER

purposes of this memorandum, the active members as defined above, will be called Group I members. Those actually working will be called Group II employees. The identity of Group II members might vary from day-to-day, or month-to-month, but it is certain that all "active" members were not working each work day of the year. This can be seen by reviewing the total number of hours worked per year, as established by Exhibit K.

Year	Total Number of Covered Hours Worked By All Active Members During This Year	Average hours Per Member	Average weeks of Employment for each active employee-35-hour work week
1975	2,671,400	1066	30.45 weeks
1976	1,988,200	1017	29.06 weeks
1977	1,819,300	1118	31.94 weeks
1978	1,950,800	1245	35.57 weeks
1979	2,263,500	1466	41.86 weeks
1980	2,815,100	1666	47.6 weeks

Records have been maintained by defendants indicating precisely how many persons had worked in any particular month. These are the "Manpower Control Reports," Exhibit L. These records indicate as follows:

JA-54

Year	Active Members "Group I"	The number of active members who had actually been working during the average month during this year. Group II members	Average Number of Unemployed "Active" Members	% of "Active" Members Unemployed
1975	2506	1694	812	32.4 %
1976	1955	1193	762	38.9 %
1977	1672	1081	591	35.3 %
1978	1567	1050	517	30.3 %
1979	1544	1053	491	31.2 %
1980	1720	1303	417	24.2 %

PART II

A Review of Activities Toward Achievement of the Quotas During The Term of the Judgments

The Court found that since the 1960's there had been four methods of entry into Local 28: 1) the apprentice program; 2) written and practical examination; 3) transfer from a sister local; 4) employment with a newly organized contractor who certified as to the ability of the person to work in accordance with journeyman standards. 401 F. Supp. 467, 474, opinion of July 18, 1975. The Court-ordered remedial provision related to all these methods of entry and created new ones to facilitate the entry of nonwhites into Local 28 and its JAC. The additional means of entry were by experience and an interview and by having defendants offer membership opportunity to members of Local 400.

1. Entry through the apprenticeship program.

During the course of their operations under the Court's judgments defendants Local 28 and the JAC have indentured apprentices at the following times and in the following numbers:

JA-55

	Class	Non-White	White	Total
1	January 1976	27	26	53
2	July 1976	-none-	-none-	-
3	January 1977	4	6	10
4	July 1977	13	12	25
5	January 1978	6	15	21
6	July 1978	13	15	28
7	January 1979	6	7	13
8	July 1979	9	8	17
9	January 1980	7	29	36

	Class	Non-White	White	Total
10	July 1980	14	27	41
11	January 1981	15	20	35
12	April 1981	16	20	36
13	July 1981	32	40	72
14	January 1982	24	26	50
		186	251	437

In addition, 12 persons, all nonwhites, commenced training under the CETA program in April, 1982, and a total of 7 apprentices were added through the organization by defendants of Pike Industries in 1982. Of these seven persons, 5 were non-white and 2 were white.

The first apprenticeship class indentured under the Court's judgment was the class of January, 1976. That class was too large and, as a result, there were insufficient employment opportunities for all the apprentices taken in. The impact of a large apprenticeship class at this particular time can be seen from the chart below:

Year	Avg. No. of Apprentices	Average No. Unempl.	Avg. Hrs. Per Wk.	Avg. Weeks Worked	Comments
1965	230	5%	35	46	-
1966	165	5%	35	46	-
1967	110	5%	35	46	-
1968	180	5%	35	46	-
1969	360	3%	35	41	5 wk. strike
1970	500	3%	35	46	-
1971	540	3%	35	46	-
1972	575	6%	35	36	8 wk. strike
1973	450	7%	35	46	35 hr. wk. for 6 mos.;
1974	340	20%	32.5	32.5	30 hr. wk. for 6 mos.
1975	269	40%	30	44	2 wk. strike

See Exhibit M

**DEFENDANT'S EXHIBIT C IN CONTEMPT I PROCEEDING —
1970 CENSUS REPORT FOR THE NYMSA**

JA-58

OCCUPATION	TOTAL	WHITE	BLACK	OTHER	HISPANIC
<i>D. Clerical and Kindred workers</i>					
	1149906 100.0	966992 84.1	170981 14.9	11933 1.0	45681 4.0
Bookkeepers	120627 100.0	109553 90.8	9674 8.0	1400 1.2	2721 2.3
Secretaries and Stenographics	327042 100.0	293678 89.8	30622 9.4	2742 0.8	9707 3.0
Other Clerical workers	702237 100.0	563761 80.3	130685 18.6	7791 1.1	33253 4.7
<i>E. Craft and Kindred workers</i>					
	506835 100.0	444284 87.7	59229 11.7	3322 0.7	25578 5.0
Auto Mechanics and Body Repairers	39409 100.0	31412 79.7	7721 19.6	276 0.7	2596 6.6
Other Mechanics and Repairers	70686 100.0	62707 88.7	7435 10.5	544 0.8	3657 5.2

JA-59

DEFENDANT'S EXHIBIT C IN CONTEMPT I PROCEEDING

Machinists	11823 100.0	10469 88.5	1301 11.0	53 0.4	680 5.8
Metal workers except above	17816 100.0	16323 91.6	1427 8.0	66 0.4	797 4.5
Carpenters	31503 100.0	28564 90.7	2820 9.0	119 0.4	939 3.0
Other Construction workers	84233 100.0	75510 89.6	8368 9.9	355 0.4	3114 3.7
Other Craft and Kindred workers	251365 100.0	219299 87.2	30157 12.0	1909 0.8	13795 5.5
<i>F. Operatives except transport</i>					
	455439 100.0	356441 78.3	87047 19.1	11951 2.6	60883 13.4
Durable Goods Manufacturing	118418 100.0	92197 77.9	24905 21.0	1316 1.1	17878 15.1

Nondurable Goods	212945	171102	34910	6933	32669
Manufacturing	100.0	80.4	16.4	3.3	15.3
Non-Manufacturing Industries	124076	93142	27232	3702	10336
	100.0	75.1	21.9	3.0	8.3
G. Transport Equipment Operatives	169628	128306	40324	998	11663
	100.0	75.6	23.8	0.6	6.9
Truck Drivers	48979	36693	12112	174	3055
	100.0	74.9	24.7	0.4	6.2
Other Transport Equipment Operatives	120649	91613	28212	824	8608
	100.0	75.9	23.4	0.7	7.1

Attachment C

DEFENDANT'S EXHIBIT C IN CONTEMPT I PROCEEDING

The data in this report is from the 1970 Census of Population. The tape was produced by the United States Department of Commerce, Bureau of the Census. Questions relating to occupation, employment status, and industry were asked on questionnaires which sampled both 15 % and 5 % of the population for a total of 20 % of the population. What is known as the Fourth Count of the Census is a tabulation of the responses to this 20 % sample. Subsequently, other tabulations were made of the 15 % sample. In either case, the statistical confidence is high because of the large random sample questioned. For the characteristics described, all sex and racial detail tabulated has been reproduced.

Table 1 of the following report is from the Second Count of the 1970 Census of Population, 100 % questionnaire. All other tables in the report are from the Fourth Count sample tabulations. Minority detail shown for each occupational category includes, for the total employed population, data for the Total, White, Black, Other, and Hispanic populations. Similarly for females, Total, White, Black, Other, and Hispanic data is included. Because this data is available for relatively small pieces of geography (census tracts, for example, contain only about 4,000 people), the Bureau of the Census released this racial detail for only 42 job titles for the total population and 27 job titles for females. (For purposes of this report, the job title 'Nurses' has been consolidated into the 'Medical & other health workers' category.) A separate table of statistics for the male/female compatible categories is also included. All tables within this report are numbered and carefully titled in a manner which explains their content. Please note the universe used for each table, specified in its corresponding title.

The data in this report is available for any arbitrary piece of geography equivalent to or larger than a census tract, as well as for standard geographical units, such as Standard Metropolitan Statistical Areas (SMSA's), counties, cities with a population of 50,000 or more, entire states, and the U.S. as a whole.

This report was prepared by National Planning Data Corporation, a Summary Tape Processing Center, recognized by the Bureau of the Census.

**DEFENDANTS' EXHIBIT K IN CONTEMPT I
PROCEEDING — INFORMATION SHEET LOCAL 28**

STATISTICS RE: EMPLOYMENT

INFORMATION SHEET

<u>Pension credit year ended December 31</u>	<u>Number of active employees during year</u>	<u>Average age</u>	<u>Average years of pension credit</u>
1975	2,506	39½	15
1976	1,955	40	16
1977	1,672	41	17
1978	1,567	41½	17½
1979	1,544	42	18½
1980	1,720	42	18

	<u>Pension Credit year ended December 31</u>	
	<u>1979</u>	<u>1978</u>
Active employees included in valuation:		
Total number	1,544	1,567
Number eligible to retire on:		
regular pension	44	20
early retirement pension	159	168
Number with vested right to deferred pension who are not eligible for immediate benefits	986	924
Inactive vested employees	560	535

**DEFENDANTS' EXHIBIT K IN CONTEMPT I
PROCEEDING**

The following table compares the assets with the value of total vested benefits:

Comparison of Vested Benefits and Assets¹

1. Present value of benefits to active employees eligible for immediate or deferred benefits	
Regular retirement	\$ 1,912,600
Early retirement	5,545,100
Vested deferred retirement	10,747,800
Total	\$18,205,500
2. Present value of benefits to inactive employees eligible for immediate or deferred benefits	6,923,900
3. Present value of benefits to pensioners and beneficiaries	29,136,000
4. Present value of all vested benefits:	
(1) + (2) + (3)	54,265,400
5. Assets at adjusted cost value	17,464,500
6. Percent of value of vested benefits funded:	
(5) ÷ (4)	32%

¹ Based on Plan provisions and actuarial assumptions used to determine the minimum contribution requirements.

Last year-end, the assets also represented 32% of the vested benefit liability.

DEFENDANTS' EXHIBIT K IN CONTEMPT I PROCEEDING

Progress of Pension Rolls Through June 30, 1980

Year ended June 30:	Awards	Deaths	Suspensions	Reinstatements	In force at end of year	
					Number	Monthly amount
Cumulative through June 30, 1980	1,773	842	164	158	925	\$304,169
Cumulative through						
1971	964	447	142	128	503	121,683
1972	51	37	12	12	517	141,497
1973	118	28	4	12	615	190,186
1974	119	43	—	3	694	224,967
1975	119	49	—	1	765	251,343
1976	106	45	—	1	827	273,918
1977	137 ¹	43	—	—	921 ¹	303,502
1978	50	54	1	—	925	304,856
1979	63	48	2	1	939	311,736
1980	37	48	3	—	925	304,169

¹ Includes two pensioners who were not reported in year ended 1977.

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DEFENDANTS' EXHIBIT K IN CONTEMPT I PROCEEDING

Fiscal year ended June 30:	Hours of Covered Employment	
	Total	Average per active employee
1976	2,671,400	1,066
1977	1,988,200	1,017
1978	1,869,300	1,118
1979	1,950,900	1,245
1980	2,263,500	1,466
1981	2,865,100	1,666

**DEFENDANTS' EXHIBIT L
IN CONTEMPT I PROCEEDING —
MANPOWER CONTROL MONTH END SUMMARY**

STATISTICS RE: EMPLOYMENT

**MANPOWER CONTROL REPORT
MONTH END SUMMARIES**

	<u>Total</u>	<u>Assoc.</u>	<u>Ind.</u>	<u>O/T</u>
Aug. 27, 1974	1,845			
Sept. 24, 1974	1,830			
Oct. 29, 1974	1,941			
Nov. 26, 1974	1,981			
Dec. 31, 1974	1,845			
Jan. 28, 1975	1,715			
Feb. 25, 1975	1,752			
March 25, 1975	1,761			
April 29, 1975	1,970			
May 27, 1975	1,801			
June 24, 1975	1,835			
July 25, 1975	1,708			
Aug. 29, 1975	1,725			
Sept. 26, 1975	1,571			
Oct. 31, 1975	1,575			
Nov. 28, 1975	1,522			
Dec. 26, 1975	1,390			
Jan. 30, 1976	1,356			
Feb. 27, 1976	1,328	857	425	46
March 26, 1976	1,279	790	451	38
April 30, 1976	1,147	739	383	25
May 31, 1976	1,149	707	414	28
June 25, 1976	1,187	732	430	25
July 30, 1976	1,181	732	425	24
August 27, 1976	1,210	775	399	36
September 24, 1976	1,184	629	511	44
October 29, 1976	1,160	621	505	34
November 26, 1976	1,081	568	475	38
December 31, 1976	1,056	565	461	30
January 28, 1977	1,051	549	470	32

	<u>Total</u>	<u>Assoc.</u>	<u>Ind.</u>	<u>O/T</u>
February 25, 1977	1,050	531	484	35
March 25, 1977	1,114	582	505	27
April 29, 1977	1,062	565	473	24
May 27, 1977	1,085	563	497	25
June 24, 1977	1,067	571	485	11
July 29, 1977	1,142	606	497	39
August 26, 1977	1,107	611	459	37
September 30, 1977	1,086	596	439	51
October 28, 1977	1,123	632	438	53
November 25, 1977	1,095	589	451	55
December 30, 1977	984	505	425	54

January 27, 1978	1,040	526	473	41
February 24, 1978	1,062	548	474	40
March 31, 1978	1,042	568	439	35
April 28, 1978	937	489	422	26
May 26, 1978	1,000	497	480	23
June 30, 1978	1,034	475	534	25
July 26, 1978	1,077	486	563	28
August 25, 1978	1,084	463	592	29
September 29, 1978	1,098	450	622	26
October 27, 1978	1,129	468	636	25
November 24, 1978	1,099	496	580	23
December 29, 1978	992	478	489	25
January 26, 1979	1,002	486	500	16
February 23, 1979	974	459	498	17
March 30, 1979	991	447	517	27

**DEFENDANTS' EXHIBIT L
IN CONTEMPT I PROCEEDING**

**SUMMARY OF HOURS AS REPORTED TO
INDUSTRY PROMOTION FUND**

	<u>Period</u>	<u>Hours</u>	<u>Daily Average</u>
1975	July	98,401	12,300
	August	299,531	11,981
	September	223,366	11,756
	October	271,729	11,322
	November	175,631	10,331
	December	189,608	9,979
1976	January	202,755	8,448
	February	156,599	8,700
	March	166,047	8,302
	April		
	May	154,893	7,744
Week end	June 4	35,098	8,775
	June 11	38,746	7,749
	June 18	42,210	8,442
	June 25	42,598	8,520
	July 2	36,353	7,271
	July 9	35,111	8,778
	July 16	37,924	7,585
	July 23	41,522	8,304
	July 30	39,823	7,965
	August 6	43,630	8,726
	August 13	39,770	7,954
	August 20	40,823	8,164
	August 27	40,581	8,116
	Sept. 3	38,938	7,788
	Sept. 10	36,643	9,161
	Sept. 17	39,655	7,931
	Sept. 24	38,637	7,727

<u>Period</u>	<u>Hours</u>	<u>Daily Average</u>
Oct. 1	37,511	7,502
Oct. 8	34,759	6,952
Oct. 15	30,568	7,642
Oct. 22	34,428	6,886
Oct. 29	31,487	6,297
Nov. 5	29,444	7,361
Nov. 12	28,924	7,231
Nov. 19	35,003	7,001
Nov. 26	26,687	6,672
Dec. 3	31,965	6,393
Dec. 10	32,919	6,584
Dec. 17	32,246	6,449

**DEFENDANTS' EXHIBIT O IN CONTEMPT I
PROCEEDING — LETTER DATED MARCH 16, 1978**

ROSENTHAL & GOLDBERGER

COUNSELORS AT LAW

44 COURT STREET

BROOKLYN, N.Y. 11201

(212) 868-8000

March 16, 1978

David Raff, Esq.
49-51 Chambers Street
New York, New York 10007

Dear Mr. Raff:

The JAC at its meeting held on March 15, 1978, discussed the current selection process. Considering the extraordinary expense involved in validating and administering an apprentice test, not to mention the general dissatisfaction of the Plaintiffs and their experts with the testing procedure, the JAC proposes the following:

1. Not give an apprentice examination for selection of January and June, 1979 classes.
2. Take in a fixed percentage of minorities for each of the above classes.
3. The aforementioned would be subject to agreement by all parties on an acceptable selection procedure to replace the test.

Comments from you and the other parties would be most appreciated.

Very truly yours,

William Rothberg

pr

cc. William Glover Esq.✓
Gerald Dunbar, Esq.
Johnny J. Butler, Esq.
Dominick Tuminaro, Esq.

**National Apprenticeship and Training Standards
for the Sheet Metal Industry, U.S. Department of Labor,
Bureau of Apprentice Training -**

Excerpt From Plaintiff's Exhibit 48 in Contempt I Proceeding

18. Ratio of Apprentices to Journeymen

The ratio of apprentices to journeymen in any local union as set forth in the Standard Form of Union Agreement shall be one apprentice for every four journeymen regularly employed throughout the year. Any other ratio must be agreed upon and set forth in the negotiated labor agreement or adenda. The local joint apprenticeship committee shall allocate these apprentices to the employers.

Page 22 of Defendants' (Petitioners')
Reply Memorandum is reprinted at
A-478 of the Appendix to the Petition
for Certiorari

Page 19 of Plaintiffs' (Respondents')
Reply Memorandum is reprinted at A-482
of the Appendix to the Petition
for Certiorari

**PLAINTIFFS' MEMORANDUM IN REPLY
TO DEFENDANTS' MEMORANDUM IN OPPOSITION,
PAGE 17**

CHART C

<u>Year</u>	<u>Average Number* of Apprentices</u>	<u>Average Hours Per Year Per Journeyman Member</u>
1970	500	2,086
1971	540	2,017
1972	575	1,406
1973	450	1,222
1974	340	1,121
1975	269	1,066
1976	134	1,017
1977	81	1,118
1978	108	1,245
1979	111	1,466
1980	125	1,666
1981	199	Data not submitted
1982	291	Data not submitted

* Figures for average number of apprentices were derived from the following:

- 1970 - 1975 — Defendants Memorandum In Opposition ("Memo"), pp. 21-22.
 1976 — Census of Local 28 Membership ("Census"), dated January 15 and September 1, 1976.
 1977 — Census dated October 6, 1977, and December 28, 1977.
 1978 — Census dated August 17, 1978, January 30, 1979 and October 29, 1979.
 1979 — Census dated March 3, 1980.
 1980 — Affidavit/Report of Edmund D'Elia, ¶ 17, dated December 15, 1980. (Exhibit 11)
 1981 — Census dated May 7, 1981.
 1982 — Census, submitted on or about April 15, 1982. (Includes 12 CETA apprentices and 7 Pike Industries apprentices).
 1970 - 1975 — Defendants Memo p. 38.
 1976 - 1980 — Defendants Memo p. 18. It appears that these figures are a continuation of data reflecting journeymen hours worked per year on p. 38 of defendants' memo. 1975 hours are found on pp. 18 and 38 of defendants' memo.

**TRANSCRIPT OF THE JULY 22, 1981 CONFERENCE,
PAGES 3, 6-7, 14-15, 17-22**

to paragraph number 17 of the revised Affirmative Action Program and paragraph 22 F of the order and judgment.

MR. RAFF: What is the basis of the application?

MR. ROTHBERG: The basis of the application is that the parties have made every attempt to meet the manpower needs of the employers through the vehicles at hand, namely, the Apprentice Program, the use of the Journeyman's test, the use of four years' experience, and have not been able to fulfill the manpower requirements for the industry at this time.

And the parties have been advised that there are unemployed sheetmetal journeymen in neighboring locals that are available to work.

MR. RAFF: How many people are you talking about?

MR. ROTHBERG: I don't have an exact number at this point —

MR. RAFF: I am not going to give a blanket written permission.

MR. ROTHBERG: I understand that. I understand that. It's a situation where I think a certain amount of flexibility is required, and we are not looking for blanket permission, but maybe we can establish

PETITIONER'S BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

— against —

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, THE CITY OF NEW YORK, and
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

MARTIN R. GOLD

Counsel of Record

ROBERT P. MULVEY

HUGH M. MCGOVERN

GOLD, FARRELL & MARKS

595 Madison Avenue

New York, New York 10022

(212) 935-9200

Attorneys for Petitioners

WILLIAM ROTHBERG

POPKIN & ROTHBERG

16 Court Street

Brooklyn, New York

(718) 624-2200

Co-Counsel for Local 28 JAC

EDMUND P. D'ELIA

655 Third Avenue

New York, New York

(212) 697-9895

*Co-Counsel for Local 28
and Local 28 JAC***BEST AVAILABLE COPY**

QUESTIONS PRESENTED

A divided panel of the United States Court of Appeals for the Second Circuit affirmed orders of the United States District Court for the Southern District of New York which held Petitioners in contempt for violating a Revised Affirmative Action Program and Order (RAAPO) and an Order and Judgment (O & J); imposed substantial monetary fines on Petitioners to establish, as part of the contempt remedy, an Employment, Training, Education and Recruitment Fund to be financed by Petitioners and to be employed solely to benefit nonwhite apprentices and journeymen; adopted an Amended Affirmative Action Program and Order (AAAPO), which included a race-conscious quota of 29.23% for nonwhite membership in Local 28; and continued the office of the Administrator, which has placed Local 28 and the Joint Apprenticeship Committee ("JAC") under a judicially-imposed receivership.

The questions presented are:

1. After a general finding of discrimination against unidentified persons, may a district court order a race-conscious affirmative action program under Title VII of the Civil Rights Act to benefit nonwhites?
2. May such an affirmative action program include a mandated percentage for nonwhite membership, denominated a "goal" but enforced as an inflexible quota and coupled with a judicial threat that the percentage must be realized by a specified date?
3. Does the Constitution prohibit such reverse discrimination as a violation of the Equal Protection Clause?
4. Does the Constitutional prohibition against bills of attainder and corruption of blood invalidate such reverse discrimination?
5. Should purportedly civil contempt remedies be declared to be illegal criminal contempt remedies imposed without due process of law when they include (a) a compensatory component

without any proof of actual damage and (b) a coercive component unrelated to the contempt and without an opportunity to purge the contempt?

6. Do findings of discrimination, premised upon improper standards and statistics, followed by findings of contempt of the resulting orders also based upon improper standards and statistics, deprive petitioners of due process of law?

7. Does a district court order appointing an Administrator with day-to-day supervisory powers over the internal affairs of a labor union violate the union's right to self-governance, or exceed the court's power to appoint special masters?

PARTIES

With the exception of the Sheet Metal and Air-Conditioning Contractors' Association of New York City ("Association"), the caption of this petition contains the names of all parties in the Court of Appeals.* The Association is composed of building contractors in New York City who are engaged in sheet metal construction work. Although no claim was made that it engaged in discriminatory practices or policies, the Association was deemed an indispensable party in the original action and was joined as a defendant for purposes of granting complete relief. (A-210 n. 3). All contempt sanctions against the Association were reversed by the Court of Appeals, and it is no longer a party.

* The contempt proceeding in the district court was also brought against 121 individual contractors. Although the district court found that all of them were guilty of contempt, it imposed no sanctions against them. They therefore did not pursue appeals.

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No. 84-1656

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

— against —

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, THE CITY OF NEW YORK, and
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

PETITIONERS' BRIEF ON THE MERITS

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals (A-1-52)¹ is officially reported at 753 F.2d 1172 (2d Cir. 1985) and is unofficially reported at 36 Fair Empl. Prac. Cas. (BNA) 1466 (2d Cir. 1985). Other reported decisions in this case, also included in the Appendix, are as follows: *United States v. Local 638 et al.*, 337

¹ References with the prefix (A-) are to the Appendix to the petition for certiorari. References with the prefix (JA-) are to the Joint Appendix.

F. Supp. 217 (S.D.N.Y. 1972); *United States v. Local 638 et al.*, 347 F. Supp. 164 (S.D.N.Y. 1972); *United States v. Local 638 et al.*, 347 F. Supp. 169 (S.D.N.Y. 1972); *Equal Employment Opportunity Commission v. Local 638 et al.*, 401 F. Supp. 467 (S.D.N.Y. 1975), *aff'd as modified*, 532 F.2d 821 (2d Cir. 1976) (Feinberg, J., concurring); *Equal Employment Opportunity Commission v. Local 638 et al.*, 421 F. Supp. 603 (S.D.N.Y. 1975); *Equal Employment Opportunity Commission v. Local 638 et al.*, 565 F.2d 31 (2d Cir. 1977) (Meskill, J., dissenting).¹

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals for the Second Circuit was entered on January 16, 1985. The petition for a writ of certiorari was timely filed on April 16, 1985 and was granted on October 7, 1985.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions involved are art. I, §9, cl. 3, art. III, § 3, cl. 2 and the Fifth and Fourteenth Amendments to the United States Constitution.

The statutory provisions involved are as follows: §§703(c)(1) and (2), 703(d), 703(j), 706(g) and 1101 of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2(c)(1) and (2), 2000e-2(d), 2000e-2(j), 2000e-5(g) and 2000h; §401(a) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401(a); and Rule 53, Fed. R. Civ. P.²

¹ Earlier proceedings in the state courts are reported as follows: *State Commission For Human Rights v. Farrell*, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. N.Y. County 1964); *State Commission For Human Rights v. Farrell*, 47 Misc. 2d 244, 262 N.Y.S.2d 526 (Sup. Ct. N.Y. County 1965); *State Commission For Human Rights v. Farrell*, 47 Misc. 2d 799, 263 N.Y.S.2d 250 (Sup. Ct. N.Y. County 1965); *State Commission For Human Rights v. Farrell*, 52 Misc. 2d 936, 277 N.Y.S.2d 287 (Sup. Ct. N.Y. County), *aff'd*, 27 A.D.2d 327, 278 N.Y.S.2d 982 (1st Dep't), *aff'd*, 19 N.Y.2d 974, 225 N.E.2d 691, 281 N.Y.S. 2d 521 (1967).

² The texts of the constitutional provisions and statutes are set forth in the appendix hereto.

STATEMENT OF THE CASE

Summary

Since 1975, petitioners, a labor union and its joint apprenticeship committee, have been living under an elaborate race-conscious affirmative action program designed to integrate the sheet metal industry in New York. The centerpieces of the program are (1) a nonwhite membership quota of 29%, denominated a "goal", and (2) a court-appointed Administrator (*i.e.* a special master) who governs petitioners with respect to the program on a daily basis, at their expense. As a result of their failure to meet the "goal", petitioners have now been held in contempt, largely for failing to comply with ministerial provisions of the program. An expanded race-conscious affirmative action program has now been ordered in which fines and penalties will fund education, training, counseling and financial assistance exclusively for non-whites. The Administrator continues to govern. Petitioners have been warned by the district court that if the nonwhite membership "goal" is not met by August 31, 1987, they "will face fines that will threaten their very existence" (A-123). A divided panel of the Court of Appeals distinguished and limited this Court's recent decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and affirmed, but stayed its mandate pending review by this Court.

Facts and Prior Proceedings

Sheet metal workers are skilled artisans who fabricate sheet metal into ducts and conduits to convey heating and air-conditioning through offices and homes. Local 28, founded on October 15, 1913, is a small union* affiliated with the Sheet Metal Workers' International Association. It is the bargaining agent for the collective bargaining unit consisting of journeymen and apprentice sheet metal workers who perform sheet metal work for contractors in New York. The JAC is an apprenticeship committee composed of labor and management representatives which

* At the time of trial of the discrimination action in 1975, Local 28's membership had peaked to 3670 members (JA-301). By March 1980, it had declined to approximately 2000 persons (JA-134).

is responsible for managing the Sheet Metal Workers' Apprenticeship Training Program.

Until 1964, employment in the sheet metal trade and membership in the union was awarded largely on the basis of nepotism and personal recommendation.⁵ Because this practice resulted in the total exclusion of blacks, the New York State Commission for Human Rights commenced proceedings to abolish it. Under the direction of a Justice of the New York State Supreme Court, and "unusual cooperative spirit on the part of the Commission, industry, union officials, their respective counsel and the Attorney General" (A-425), a formal plan was adopted and judicially ordered (A-411) known as the "Corrected Fifth Draft" (A-427). Since the primary entry point into the industry was, and still is, the apprentice program through which approximately 80 % of new members join (A-325), the linchpin of the 1964 plan was an aptitude test affording all applicants equal opportunity, and making selections "in order of rank" (A-430), and "solely and exclusively on the point score" (A-424), after satisfying a high school prerequisite and certain other requirements (A-428-429).

In 1971, the United States commenced the present litigation against Local 28 and three other unions and their JACs.⁶ In 1975, after trial, the district court found that Local 28 and the JAC had discriminated against nonwhites in violation of Title VII,

⁵ Local 28 never maintained a hiring hall. Throughout the major portion of the union's history, referral and hiring was done informally through word of mouth and contacts with other members, apprentices and contractors (JA-317). For example, in the apprenticeship class graduated immediately prior to the passage of the Civil Rights Act of 1964, approximately 80 % of those indentured were related to members of Local 28. Recommendations of relatives of Local 28 members were also given weight in the appointment of apprentices (JA-304-305).

⁶ The case was severed as to each of the defendant unions prior to trial and has since been separately litigated. The Equal Employment Opportunity Commission was substituted as named plaintiff for the federal government (A-210). The New York City Commission on Human Rights was granted leave to intervene in the action against Local 28 (A-394-401). The New York State Division of Human Rights, initially named as a third-party defendant, realigned itself as a plaintiff (A-6).

largely by obeying the Corrected Fifth Draft ordered by the state court. The district judge ruled that this plan discriminated because blacks did not perform as well on the uniformly administered aptitude test as whites, and performance on the test was not related to performance as a sheet metal worker (A-330-338). Similarly, taking judicial notice of the fact that a smaller percentage of blacks than whites complete high school, he enjoined adherence to the high school requirement for admission to the apprentice program which the state court had ordered, ruling that this requirement was not job related (A-338-339). After concluding that entry points to the industry other than the apprentice program were also deficient in producing minority representation, the district court engaged in a statistical analysis, both to confirm the finding of discrimination, and to fix a minority membership "goal." The court found the percentage of nonwhites in the City of New York to be 29 %, and adopted that percentage as the "goal" for Local 28, despite the fact that a large part of Local 28's membership was, and is, drawn from surrounding areas (A-186, 236) which clearly have a larger proportion of whites.

On August 28, 1975, the district court entered an Order and Judgment (the "O & J") (A-300-316), the centerpiece of which was a 29 % nonwhite membership quota which petitioners were "directed and ordered to achieve" by July 1, 1981 (A-305).⁷ Numerous provisions of the O&J specifically required that preferences be given to nonwhites in order to achieve the "goal" (See e.g. ¶¶ 11, 12, 14(c), 21, 21(d), 22(b), 22(c) and 22(d)) (A-305-314). In the O&J, the court also appointed a special master, called an Administrator, with broad supervisory powers, who was to propose and implement an affirmative action plan

⁷ Racial hiring pursuant to fixed and intransigent percentages has been involved in this action even before the entry of the O&J in 1975. Pursuant to an order dated April 9, 1974, Local 28 and the JAC were directed to admit six nonwhites for advanced placement in the apprenticeship program (JA-366-368). On July 2, 1974, the district court ordered the JAC to indenture and assign for employment a class of sixty apprentices, comprising forty whites and twenty nonwhites (JA-363-365). These orders were complied with.

to govern petitioners' employment practices. Petitioners were also ordered to keep extensive records.

The Administrator submitted an Affirmative Action Program and Order (AAPO) (A-230-254) which was adopted by the district court. It established interim annual goals⁸ for nonwhite membership in Local 28, detailed the mechanics for the conduct of the testing and apprenticeship programs and set forth elaborate record-keeping requirements for Local 28 and the JAC. AAPO is replete with provisions ordering racial preferences. (See e.g. ¶¶ 14, 15, 16, 17) (A-234-241).

AAPO was substantially affirmed by the Court of Appeals⁹ (A-207-229), although the majority acknowledged that the goals would result in whites being "kept out of the defendant union solely on account of their race or ethnic background" (A-216).

⁸ The interim goals for achieving the 29% minority balance suggested by the Administrator and adopted by the district court were as follows:

July 1, 1976	10%
July 1, 1977	13%
July 1, 1978	16%
July 1, 1979	20%
July 1, 1980	24%

(A-232).

⁹ The Court of Appeals modified AAPO to the extent it had required that one of the three union representatives to the JAC be replaced by a representative of minority descent and that three nonwhites be admitted to the apprenticeship program for every two whites admitted. It held that these remedies constituted quotas of a nature forbidden by Title VII. Judge Feinberg concurred in the result and the disapproval of the racial quotas. He wrote separately to stress the difference between racial quotas and goals, and to note his approval of the 29% figure in the district court order because it was a goal (A-227-229). In a subsequent report to the district court, the Administrator complained that given the unemployment crisis which would plague the sheet metal industry "for many years to come," the Court of Appeals' disapproval of the 3:2 nonwhite preference had denied him "the only realistic means of reaching the court approved goal" (JA-218).

Thereafter, a Revised Affirmative Action Program and Order (RAAPO) was entered in 1977 (A-182-206). RAAPO preserved the interim percentages in AAPO but revised them downward in recognition of unemployment in the industry (JA-164).¹⁰ Various racial preferences were continued. (See e.g. ¶¶ 12, 13, 14, 29) (A-184-198). RAAPO also created a Board of Examiners to oversee and grade the union's "hands-on" journeyman's test (A-188) over the union's objections that such a reviewing board was an unwarranted intrusion into its internal affairs (JA-237-238).

A divided panel of the Court of Appeals affirmed RAAPO (A-160-181). Judge Meskill dissented (A-169-181) on the ground that the findings of discrimination, which had been approved by the earlier Court of Appeals decision, had been improperly derived from employment statistics which violated this Court's intervening ruling in *Hazelwood School District v. United States*, 433 U.S. 299 (1977). These statistics utilized a population base restricted to New York City (A-322, 353) as opposed to the wider geographical area from which the union actually attracted applicants, as is reflected in both AAPO and RAAPO (A-186, 236). In addition, the findings were in part based upon discriminatory practices which occurred prior to passage of the Civil Rights Act of 1964 (A-322, 325). Thus, the district court had relied upon

¹⁰ The revised interim goals for nonwhite membership in the union were as follows:

July 1, 1977	8%
July 1, 1978	11%
July 1, 1979	15%
July 1, 1980	19%
July 1, 1981	24%

(A-184). Again in response to the "depressed state of the sheetmetal industry" (JA-164), the July 1, 1981 deadline for achieving overall minority representation of 29% was extended in RAAPO until July 1, 1982 (A-183). Indeed, in his report recommending the adoption of RAAPO, the Administrator acknowledged the absence of meaningful employment opportunities for apprentices with the individual employers who ultimately controlled the apprentice employment but were not subject to the court's orders (JA-175-176).

the fact that total minority membership as at 1974 was 3.19%, whereas 10.06% of those entering the industry after the passage of the Act were of minority extraction (A-325-326). Judge Meskill concluded that the failure to apply the *Hazelwood* criteria "cast substantial doubt on the existence of illegal discrimination by these unions" (A-169).

The majority agreed that the statistics had been misused, but declined to reverse. Writing for the majority, Judge Smith stated that the use of New York City as a geographical base went more toward the establishment of the requisite minority percentage than the finding of discrimination which, he implied, was of lesser importance (A-167). The proper percentage goal has now become most relevant; petitioners have been held in contempt for failing to achieve it.

For the next several years, Local 28 and the JAC were governed by the O & J, RAAPO and the day-to-day dictates of the Administrator. In response to *sua sponte* orders of the Administrator in 1979 and 1980^a (JA-130-132, 138-141, 148-151) requesting a report on the efforts since 1975 to achieve the 29% "goal", the union prepared a progress report (JA-88-129) which detailed "the lack of interest in becoming a local 28 member" in the prevailing economic climate. Similar reports had been submitted by the JAC in 1979 (JA-152-156) and 1980 (JA-133-137) detailing efforts to increase minority participation during a period in which only 900 journeymen and 50 apprentices were working in the entire industry, and many of these were employed on a reduced workday basis (JA-134).

Between 1976 and 1982, the Administrator was in complete control of every aspect of Local 28 and the JAC which affected

^a The Administrator offered no legal basis for his authority to issue *sua sponte* orders which exceeded the broad range of power afforded him in the O&J (A-305-306). Such conduct, however, typified the authoritarian manner in which the Administrator interpreted his role throughout his tenure. Indeed, shortly after the creation of his office, the Administrator suggested to the court that the O&J be modified to limit petitioners' right of appeal to the district court as apparently had been accomplished in another case where an administrator was overseeing a union's compliance with an affirmative action program (JA-217-218). This suggestion was not adopted by the district court.

minority membership. He approved each apprentice class, the major entry point into the industry. These consisted of approximately 45% persons of minority extraction (JA-96-97; A-42-43). During this period of extreme economic distress for the New York sheet metal industry (A-23-24, 46), total nonwhite membership in Local 28 increased from 6.1% to 14.9%, while total membership declined.

Despite the substantial increase in nonwhite membership, in April 1982, as the extended July 1982 deadline for reaching the quota approached, the City and State, engaging in what Judge Winter characterized as "reactive finger pointing at Local 28" (A-48), initiated contempt proceedings against the petitioners, claiming they had failed to achieve the requisite 29% "goal" (A-441-477).

The contempt proceeding was clearly premised on the failure to meet the requisite percentage of minority membership (A-455-457, 470-471). Nevertheless, after a brief hearing the district court purported to hold petitioners in civil contempt for (1) underutilization of the apprenticeship program; (2) failure to conduct the general publicity campaign ordered in RAAPO; (3) adoption of a job protection provision in the collective bargaining agreement that favored older workers during periods of unemployment (older workers' provision); (4) issuance of unauthorized work permits to white workers from sister locals; and (5) failure to maintain and submit certain records and reports. The district court imposed a fine of \$150,000 for the purpose of developing a fund to be administered by the court through the Administrator, to be used to increase minority membership in Local 28. An additional "coercive fine" was to await the recommendation of the Administrator (A-149-150).

In holding petitioners in civil contempt, the district court stated that it was "... not holding the defendants in contempt for their failure to attain the 29% goal ..." (emphasis in original), but "that the collective effect of these violations has been to thwart the achievement of the 29% goal of non-white membership. ..." (A-155-156).

In April 1983, the City commenced a second contempt proceeding before the Administrator, charging Local 28 and the JAC

with violating certain ministerial provisions of the O & J and RAAPO: (1) Local 28's tardy submission of various records; (2) submission of certain inaccurate data by Local 28 and the JAC,¹² and (3) Local 28's failure to serve the O & J and RAAPO on certain contractors (A-127-148). No act of racial discrimination was alleged in the second contempt proceeding.

In his report to the district court, the Administrator recommended that Local 28 and the JAC be held in contempt, and that as remedies they should pay for the development and maintenance of a computerized recordkeeping system, and that additional fines, costs and attorneys' fees should be assessed although no wilful misconduct was charged (A-142-143). The district court adopted all of the Administrator's recommendations without comment (A-125-126).

On September 1, 1983, the district court issued an order detailing its major contempt remedies (A-113-118). It established an Employment, Training, Education and Recruitment Fund ("Fund"), "for the purpose of promotion, training, education and recruitment", and providing a tutorial program, summer jobs, counselling and support services, and financial support. The order specifically states that the Fund shall be used "solely for the benefit of nonwhites" (A-114). It was to be financed by the \$150,000 levied against petitioners in the first contempt proceeding, plus additional administrative expenses and a further fine of \$.02 per hour for each journeyman and apprenticeship hour worked, all assessed against Local 28 and the JAC "in lieu of" the additional fines anticipated in both contempt proceedings. The Fund is to continue until the "goal" is achieved, and the court determines it is no longer necessary (A-113-118).

By separate order (A-111-112), the district court adopted an Amended Affirmative Action Program and Order ("AAAPO") (A-53-107) which altered RAAPO in various ways, including: (1) implementing the contempt remedy requiring computerization of records; (2) extension of the plan's coverage to include merged

¹² The sum total of the "inaccurate data" enumerated by the Administrator consisted of describing "Kaplan" as a Spanish surname and "Marquez" as a "white" surname (A-132-133).

locals and their JACs; (3) a requirement that one nonwhite apprentice be indentured for each white apprentice; (4) a requirement that contractors employ one apprentice for every four journeyman; (5) replacement of the apprenticeship testing program with a three-member selection board; and (6) additional reporting requirements imposed upon the contractors. AAAPPO continues the office of Administrator. The expenses of the entire affirmative action program, including the fees of the Administrator (at \$150 per hour), his office and administrative expenses, and expenses of the selection board are all to be borne by Petitioners.

AAAPPO also adopted a 29.23 % nonwhite membership "goal"; the slight change from 29 % resulted from the merger of several unions into Local 28. In a separate memorandum and order adopting the 29.23 % "goal" (A-119-124), the district court stated that if the petitioners fail to achieve the percentage by August 31, 1987, they "will face fines that will threaten their very existence" (A-123).

The Court of Appeals affirmed all findings of contempt against Local 28 and the JAC, save one. The exception was the inclusion of the older workers' provision in the collective bargaining agreement, which the court held could not form the basis for contempt because it had never been implemented. Inasmuch as the only contempt finding against the Association was occasioned by its agreement to the older workers' provision, all findings and sanctions entered against it were reversed. The court affirmed all contempt remedies against Local 28 and the JAC, including the Fund created only to benefit nonwhites. The adoption of AAAPPO was affirmed with two modifications. First, AAAPPO's requirement that the JAC indenture whites and nonwhites on a 1:1 ratio was reversed. Second, the court clarified selection board procedures to avoid possible confusion as to whether such procedures can be utilized before the 29.23 % nonwhite membership goal is reached.

Judge Winter dissented and voted to reverse AAAPPO and all findings and remedies. He found "that Local 28 had the approval of the administrator for every act it took that affected the number of minority workers entering the sheet metal industry" (A-38); that the 29 % "goal" was, in fact, "an inflexible racial quota" which

is illegal and unconstitutional (A-38-39); that the only allegation even remotely justifying "the extraordinary sanctions imposed" was the allegation of underutilization of the apprenticeship program over which the Administrator had total control (A-39); that the finding of underutilization was based on a statistical analysis which the entire panel and all parties agreed was erroneous (A-43); that Local 28 has improperly been effectively placed in receivership and denied its right of self-government (A-38, 45); and that the race-conscious contempt remedies are inconsistent with this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and are of "questionable constitutional validity" (A-44, 48).

The powers of the Administrator, referred to by Judge Winter, cannot be overstated. Among the numerous and diverse functions performed by the Administrator he drafted the entire affirmative action program (A-255); adjudicated back pay awards (A-307, order filed October 11, 1977); evaluated and modified petitioners' hands-on journeymen tests (order filed February 14, 1978); approved the composition of apprentice classes (A-42); reported on a motion to disqualify counsel (order filed October 25, 1977); supervised compliance with the numerous reporting requirements contained in the O&J and RAAPO (A-305-306); instituted and adjudicated numerous separate contempt proceedings, both civil and criminal, against individual contractors for failures to meet reporting requirements (orders filed October 30, November 2, 1981); ordered petitioners to conduct an economic survey of the entire sheet metal industry in 1979 and 1980 to determine why the quota had not been met (JA-130-132, 138-141, 148-151); conducted the second contempt proceeding against petitioners and made findings of fact and conclusions of law (A-127-143); and formulated the remedies for both contempt proceedings now before this Court (A-126, 156).

Petitioners continue to be charged with engaging in "pernicious discriminatory practice" (A-112). But the record of this case demonstrates that for many years they have sought to speed the process of admitting minorities, achieve the quota, and end the daily regulation and great financial burden they have been enduring. In March 1978, in order to assure the admission of

minorities, Local 28 and JAC sought permission to abandon the aptitude test and simply admit a fixed percentage of minorities to each apprentice class. Respondents initially rejected the suggestion, but later accepted it for the February 1981 apprentice class, assuring 45% minority representation in each class thereafter (JA-96-97).

After the first contempt proceeding in 1982, petitioners attempted a more radical approach. They entered into negotiations with respondents City of New York and New York State Division of Human Rights, and on December 17, 1982, reached agreement on a Modified Affirmative Action Program and Order ("MAAPO"), which was submitted to the district court for approval. MAAPO contained direct racial quotas for admission to the apprentice program and other overt preferences to minorities. Because MAAPO also ended the office of Administrator, his strong opposition to its adoption was no surprise.¹³ His report correctly states that "the parties are seeking an easy way out from a complex and difficult problem by presenting to the court a method of simply moving nonwhites into the JAC to meet the 29% goal . . ." (Administrator's Objections to Proposed Modified Affirmative Action Program and Order, filed May 16, 1984, at p. 4).

By order dated April 11, 1983, (the same date on which the second contempt proceeding was filed), the district court rejected MAAPO. The court, however, specifically approved the quotas MAAPO had contained (JA-33). AAPO, thereafter ordered by the district court, included these quotas in more simplified form, requiring that whites and nonwhites be indentured on a 1:1 ratio. The Court of Appeals struck that provision, but affirmed the quota, the Fund order and all other race-conscious provisions.

In effect, Local 28 remains in receivership, and the expenses of this long ordeal continue to mount. The district court has stated that if the membership quota is not achieved by August 31, 1987, petitioners "will face fines that will threaten their very existence" (A-123).

¹³ By February 7, 1983, the Administrator had already collected \$245,803 in fees from petitioners (JA-38d). As of the end of November 1985, he has received \$618,544.

SUMMARY OF ARGUMENT

The judicially-imposed racial quota and other provisions requiring petitioners to grant racial preferences to minorities, originally ordered in 1975, and enlarged by the post-contempt orders, are not permissible remedies for violations of Title VII of the Civil Rights Act of 1964. The Court has consistently ruled that make-whole relief under Title VII may be awarded only to identifiable victims of past discrimination and not to an entire racial or ethnic group.

The legislative history of Title VII evidences a uniform Congressional intent that the statute not be read to sanction racial preferences to remedy past discrimination except for actual victims. Congress intended to outlaw all discrimination in employment; not to substitute one form of discrimination for another.

The interpretation of Title VII adopted by the lower court, which sanctions judicially-mandated racial preferences in employment, violates the Equal Protection Clause of the Fourteenth Amendment, and would convert the statute into a bill of attainder working corruption of blood in violation of art. I, §9, cl. 3 and art. III, §3, cl. 2 of the Constitution.

In 1975, the district court fixed the minority membership "goal" for Local 28 at 29%. In so doing, it used a geographical area different than the area from which the union actually drew its membership. The finding of discrimination was made, in part, by comparing this percentage with total nonwhite union membership, improperly including in the latter figure the results of hiring practices engaged in prior to the enactment of the Civil Rights Act of 1964. This misuse of statistics violated fundamental rights and resulted in a baseless quota which petitioners have now been held in contempt for failing to achieve.

The fines and other penalties levied upon petitioners cannot be justified as civil contempt remedies, which may only be imposed to compensate actual victims of contemptuous acts for damages they have proved, or to coerce compliance with orders which have not yet been obeyed. The Court of Appeals found that the penalties had a coercive component because they served to induce petitioners to achieve the "goal". In so ruling, the

Court of Appeals was clearly treating the "goal" as a quota, and the contempt as having been imposed for failure to achieve it.

The office of Administrator, created in 1975 and enhanced by the post-contempt orders, is an improper intrusion upon the right of union self-government which is guaranteed by the Labor-Management Reporting and Disclosure Act of 1959 and which Congress intended not to trammel by the Civil Rights Act of 1964. The broad power granted to the Administrator is an abdication of judicial function in violation of Rule 53, F. R. Civ. P. and art. III, § 1 of the Constitution.

ARGUMENT

I

COURT-IMPOSED RACIAL QUOTAS AND RACE-CONSCIOUS REMEDIES ARE ILLEGAL UNDER TITLE VII

A. Statute and Case Law

Since 1975, Local 28 and its JAC have labored under a court-imposed inflexible racial quota. In addition, race-conscious preferences have been included in the O&J, the affirmative action plan in all of its forms, and now in the Fund order, under the guise of a contempt remedy.

Such judicial decrees constitute racial employment preferences, illegal under Section 703(j) of Title VII, 42 U.S.C. §2000e-2(j), which provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or

classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

The Fund order and various provisions of the O&J and the affirmative action orders are also specifically proscribed by Sections 703(c)(1) and (2) and 703(d), 42 U.S.C. §§2000e-2(c)(1) and (2) and (d), which provide:

It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

All of these orders are beyond the scope of remedies permitted under Title VII. Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g), as pertinent herein, states:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... [or any other equitable relief as the court deems appropriate ...]¹⁴

Since 1971, the Court has construed the above provisions of Title VII in light of the overall purpose of the Civil Rights Act of 1964 "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971). *Accord: Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

Consistent with this principle, the Court has uniformly held that court-ordered Title VII remedies are restricted to make-whole relief benefiting actual identifiable victims of past discrimination. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2588-2590 (1984); 104 S. Ct. at 2593-2594 (O'Connor, J., concurring); *Ford Motor Co. v. E.F.O.C.*, 458 U.S. 219 (1982); *Connecticut v. Teal*, 457 U.S. 440, 453-454 (1982); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-372 (1977); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 763-764, 769 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).¹⁵

¹⁴ The bracketed language was added by Pub. L. 92-261 §4 (a). It applies to all charges pending before the Commission on the date of its enactment [March 24, 1972], and to those filed thereafter. *Id.* §14. It does not apply to cases such as the present one which were already pending in the courts on the date of enactment. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 471 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

¹⁵ *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) is consistent. The Court emphasized that its holding was narrow and limited to voluntarily-adopted affirmative action plans: "we are not concerned with what Title VII (footnote continued)

Accordingly, the Court has repeatedly stressed that the focus of Title VII is on relief to the individual employee and not remedies directed to racial classes. In *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978), the Court explained:

The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class.

Similarly, in *Connecticut v. Teal*, *supra*, the point was repeated:

The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee.

See also *Arizona Governing Committee v. Norris*, 103 S. Ct. 3492 (1983), where the point was reiterated in the individual opinions. *Id.* at 3496 (Marshall, J., concurring); *Id.* at 3508 (Powell, J.); *Id.* at 3511 (O'Connor, J., concurring).

In *Albemarle Paper Co. v. Moody*, *supra*, the Court held that discrimination in the employment context was a legal injury of an economic character to be remedied by backpay awards, noting that the Title VII remedial provision was modelled on the backpay provision of §10(c) of the National Labor Relations Act, 29 U.S.C. §160(c). *Id.* 422 U.S. at 419-421 and 419 n. 11. Accord: *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 769 (1976). It further indicated that courts exhausted their remedial powers under §706(g) when they enjoin the discriminatory practices and

requires or with what a court might order to remedy a past proved violation of the Act." *Id.* 443 U.S. at 200. Chief Justice Burger dissented on the ground that even this limited result was contrary to the explicit language of Title VII, forbidding racial preferences. *Id.* 443 U.S. at 216-218. In a separate dissent, Justice Rehnquist reviewed the legislative history of Title VII to demonstrate that discriminatory preferences for any group, minority or majority, are proscribed by Title VII, and that even the narrow holding of the majority opinion did violence to the language and legislative history of the Civil Rights Act. *Id.* 443 U.S. at 219-255.

award backpay to the actual victims of past discrimination.¹⁶ *Id.* 422 U.S. at 417-418, 423.

As the Court stated in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971),

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

Accord: *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-801 (1973). See also, *United Steelworkers of America v. Weber*, 443 U.S. 193, 218 (1979) (Chief Justice Burger, dissenting), 443 U.S. at 222 (Rehnquist, J., dissenting).

In short, the Court has never approved judicially-imposed remedies under Title VII unless carefully tailored to benefit actual identifiable victims of past discrimination. Even when limited to aiding such persons, remedies may not trammel the rights of the innocent. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 239-241 (1982).

The Court confirmed its earlier decisions in *Stotts*, where Justice White, joined by Chief Justice Burger, Justice Rehnquist and Justice Powell, reviewed Section 706(g) and its legislative history and held that courts could not order race-conscious remedies except to award damages to actual victims of past discrimination. *Id.* 104 S. Ct. at 2588-2590. Justice O'Connor

¹⁶ In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Court held that court-ordered retroactive seniority was a permissible class action remedy under Title VII, but only for individuals who had been discriminated against with respect to transfers and promotions. *Id.* 431 U.S. at 329-331. To the extent that the order also included nonapplicants who had not sought transfers, the government would be required to prove for each individual nonapplicant that he would have applied for the transfer but for the company's discriminatory practices. Thus, the incumbent nonapplicants were also identifiable victims. *Id.* 431 U.S. at 371-372.

wrote separately, 104 S. Ct. at 2593-2594, to concur on the limitations on court-imposed Title VII relief: "a court may use its remedial powers ... only to prevent future violations and to compensate identified victims of unlawful discrimination."

The court below distinguished *Stotts* on three separate grounds, none of which withstands analysis. First, the court noted that the *Stotts* affirmative action plan was in conflict with a bona fide seniority plan exempted by §703(h) of Title VII (A-30). In *Stotts*, however, the Court held that the trial court's disregard of the seniority system overstated the authority of the courts to fashion remedies under §706(g) of Title VII. *Id.* 104 S. Ct. 2588-2589. Thus, the relief ordered was in direct conflict not only with §703(h) of Title VII but also with §706(g), and the Court's holding embraced both of these provisions.¹⁷

Next, the Court of Appeals stated that the *Stotts* discussion of §706(g) related only to "make-whole" relief, and did not apply to prospective racial preferences such as that ordered in the present case which, it ruled, are permitted under §706(g) (A-30). However, as this Court expressly stated in *Stotts* and its earlier Title VII decisions, it is §706(g) *itself* which is limited to make-whole relief. Prospective remedial relief to nonidentified victims of past discrimination is not permitted under §706(g), and is specifically prohibited by §703(j).

Finally, the court below stated that this Court's discussion of §706(g) did not apply to petitioners because *Stotts*, involving judicial modification of a consent decree, did not present a case where findings of intentional discrimination had been made (A-31). This ignores the express language of §706(g) which premises all judicial remedial action upon a finding "that the

¹⁷ Even if the *Stotts* discussion of §706(g) is considered an alternative holding, its precedential value is undiminished. *D. Simon v. Kroger*, 105 S. Ct. 2155, 2157 n. 1 (1985) (White, J., dissenting from denial of certiorari); *Commonwealth of Massachusetts v. United States*, 333 U.S. 611, 623 (1948); *Richmond Co. v. United States*, 275 U.S. 331, 340 (1928); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924); *Union Pacific R. Co. v. Mason City & Fort Dodge R. Co.*, 199 U.S. 160, 166 (1905).

respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice" in violation of Title VII.

Justice Blackmun, dissenting in *Stotts*, concluded that courts are empowered to provide race-conscious affirmative action to unidentified individuals. His view is based upon the clause of §706(g) which permits courts to order "any other equitable relief as the court deems appropriate." *Id.* 104 S. Ct. at 2605-2606. That provision, however, was added in 1972 without extensive discussion, and has no retroactive application to this case. See n. 14 *supra*. In any event, it is difficult to read that phrase so broadly as to justify quotas and preferences and thus abandon the clear purpose of the Eighty-eighth Congress which enacted Title VII. In addition, such an interpretation would effectively repeal §703(j), which forbids preferential hiring, and is thus contrary to rules of statutory construction. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 416-417 (1968).

B. Legislative History

The debate before the Eighty-eighth Congress on the numerous bills that ultimately became Title VII of the Civil Rights Act reflects the frequently-voiced concerns of bipartisan members of Congress, as well as members of the business and labor community, that Title VII not be utilized in a manner to enforce strict racial quotas or preferential hiring to correct prior racial imbalances in employment. It further demonstrates that §703(j) was expressly added to Title VII to allay these apprehensions.

Assurances that mathematical quotas and preferential hiring would not be ordered appear early in the House consideration of H.R. 7152, introduced by Representative Celler of New York on June 20, 1963. Representative McCullough, and others, explained the basic purpose of the bill in "Additional Views on H.R. 7152":

It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard,

nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.

* * *

Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification.

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), *reported in* 2 U.S. Code Cong. & Ad. News 2391, 2515-2516 (1964).

Representative Celler, in his opening speech, dismissed charges in a Minority Report that the legislation would require racial hiring to achieve balancing:

[T]he charge has been made that the Equal Employment Opportunity Commission to be established by title VII of the bill would have the power to prevent a business from employing and promoting the people it wished, and that a "Federal inspector" could then order the hiring and promotion only of employees of certain races or religious groups. This description of the bill is entirely wrong.

* * *

Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination. The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous.

* * *

The Bill would do no more than prevent ... employers from discriminating against or in favor of workers because of their race, religion, or national origin.

It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing "racial or religious imbalance" in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped. 110 Cong. Rec. 1518 (1964).

Representative Lindsay also supported the bill and sought to assuage opponents' fears regarding quotas or preferences:

This Legislation ... does not, as has been suggested heretofore both on and off the floor, force acceptance of people in ... jobs ... because they are Negro. It does not impose quotas or any special privileges of seniority or acceptance. There is nothing whatever in this bill about racial balance as appears so frequently in the minority report of the Committee.

What the bill does do is prohibit discrimination because of race 110 Cong. Rec. 1540.

He subsequently added to his earlier remarks "to emphasize ... that this bill does not require quotas, racial balance, or any of the other things that the opponents have been saying about it." 110 Cong. Rec. 15876.

Representative Goodell agreed:

There is nothing here as a matter of legislative history that would require racial balancing. ... We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved. It is a matter of an individual's rights having been violated, charges having been brought, investigation carried out and conciliation having been attempted and then proof in court that there was discrimination and denial of rights on the basis of race or color. 110 Cong. Rec. 2558.

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum states:

Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But Title VII does not permit the ordering of racial quotas in business or unions and does not permit interferences with seniority rights of employees or union members. 110 Cong. Rec. 6560.

The protracted debate in the Senate also thoroughly considered and rejected challengers' contentions that the bill would impose quotas and preferential hiring on employers and unions. Senator Humphrey, a leading proponent of the Civil Rights Act, was most vocal on this point: "The bill does not require that at all. If it did, I would vote against it. There is no percentage quota." 110 Cong. Rec. 5092. The Senator further explained that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." 110 Cong. Rec. 5423. With respect to the provision that ultimately became the remedial section of Title VII, §706(g), Senator Humphrey explained:

No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as §706(g)]

Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing,

or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications not race or religion. 110 Cong. Rec. 6549.

In a subsequent address, Senator Humphrey reemphasized his views:

The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices. 110 Cong. Rec. 11848.

Senator Kuchel, also supporting passage, stated:

Employers and labor organizations could not discriminate in favor of or against a person because of his race, his religion, or his national origin. In such matters ... the bill now before us ... is color-blind. 110 Cong. Rec. 6564.

Senators Clark and Case, floor managers for Title VII, issued a joint interpretative memorandum to the Senate:

There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial

balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. 110 Cong. Rec. 7213.

* * *

The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay. This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices, 29 United States Code 160(b). No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section 707(e) [enacted as 706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin. 110 Cong. Rec. 7214.¹⁸

¹⁸ A Justice Department memorandum provided the Senate with its interpretation of Title VII:

Finally, it has been asserted that title VII would impose a requirement for "racial balance." This is incorrect. There is no provision ... in title VII ... that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance.... No employer is required to maintain any ratio of Negroes to whites.... On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all. 110 Cong. Rec. 7207.

Reacting to objections raised by Senators Robertson, Smathers and Sparkman that Title VII would be interpreted to coerce employers and unions to make decisions on the basis of race, 110 Cong. Rec. at 7418-7420; 8500; 8619, Senator Williams countered:

Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a "white only" employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. ... Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense. 110 Cong. Rec. 8921.

In direct response to these continuing charges of coercive reverse discrimination, Congress adopted the Dirksen-Mansfield amendment which included §703(j), specifically aimed at dispelling the oppositions' concerns and prohibiting preferential racial hiring to correct racial imbalance. *United Steelworkers of America v. Weber*, 443 U.S. 193, 207 n. 7 (1979); 443 U.S. 243-244 (Rehnquist, J., dissenting). See also, Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 450 (1966).

The court-ordered affirmative relief imposed upon Local 28 and its JAC constitute remedies beyond the scope of §706(g) and involve quotas and race-conscious remedies that Congress sought to preclude with the inclusion of 703(j) in Title VII. The promises and clear intentions of virtually every member of Congress who spoke in support of Title VII were disregarded at an early stage of the present case (A-216). Courts are limited to interpreting statutes to give effect to the Congressional intent as reflected in the statutory language and its legislative history. *United States v. Rutherford*, 442 U.S. 544, 555 (1979); *TVA v. Hill*, 437 U.S. 153, 195 (1978). See also, *United Steelworkers of*

America v. Weber, 443 U.S. 193, 218-219 (1979) (Chief Justice Burger, dissenting).

Finally, as discussed below, the construction of Title VII adopted by the majority below is at odds with the Equal Protection Clause of the Fourteenth Amendment and the prohibition against bills of attainder and corruption of blood contained in art. 1, §9, cl. 3 and art. III, §3, cl. 2 of the Constitution, and thus violates the presumption that Congress intends to enact constitutional legislation. See, e.g., *Singer Sewing Machine Co. v. Brickell*, 233 U.S. 304, 313 (1914).

II

THE FUND ORDER AND AAAPPO VIOLATE THE CONSTITUTION

A. Equal Protection of the Law

The legislative history of Title VII evidences a clear Congressional intent not to authorize the substitution of one form of discrimination for another. The interpretation of Title VII now on review is much different, and would render the statute inconsistent with the Equal Protection Clause as it has long been understood.¹⁹

Although in its historical context the immediate purpose of the Fourteenth Amendment was to secure full citizenship for the newly freed slaves, even the framers of the Amendment recognized

¹⁹ Through the Due Process clause of the Fifth Amendment, the equal protection safeguards of the Fourteenth Amendment are applicable to actions of the federal government and its agencies, including the judicial orders before the Court, and prohibits the federal government from discriminating between individuals or groups. *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 99-100 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n. 3 (1975); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

the ecumenism of the language of the Equal Protection Clause.²⁰ Early in this century, the Court acknowledged the broad reach of the language. *Buchanan v. Warley*, 245 U.S. 60, 76 (1917) (although "a principal purpose of the ... Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States. This is now the settled law.")

This Court's decisions affording equal protection to citizens of diverse ethnic backgrounds demonstrate the universality of the Clause: *Regents of the University of California v. Bakke*, 438 U.S. 265, 287-320 (1978) (opinion of Powell, J.) (invalidating special admissions program for nonwhites as unconstitutional); *Hernandez v. State of Texas*, 347 U.S. 475 (1954) (holding that systematic exclusion of Mexicans from jury service violated Clause); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) (striking down California law barring fishing licenses to aliens); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) (applying Clause to Chinese); *Truax v. Raich*, 239 U.S. 33 (1915) (applying Clause to protect right to employment of white resident alien).

In an early interpretation, the Court explained that the Clause would reach charges of reverse discrimination by whites:

If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding

²⁰ See Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 132, 136-143 (1950). The genesis of the Clause was in the egalitarian philosophical discourses of Herodotus, Seneca, Milton, Diderot and Rousseau. The first use of the phrase in a Congressional Amendment introduced in 1865, indicated the universality of its application: "to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property." *Id.* at 138.

all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.

Strauder v. West Virginia, 100 U.S. 303, 308 (1879). Accord: *Fullilove v. Klutznick*, 448 U.S. 448, 526 (1980) (Stewart, J., dissenting) ("The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is 'universal in [its] application, to all persons ... without regard to any differences of race, or color, or of nationality.'" *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1866)).²¹

There is a common thread connecting the cases which address statutes conferring benefits on a racial basis. Although the test has been stated differently by many Justices, this Court has not approved racial classifications unless (1) Congressional findings have been made that members of one group have suffered discrimination; (2) the legislation is tailored to benefit only the individual victims; and (3) although the statute may confer benefits unavailable to others, it does not trammel their fundamental rights. Cf. *Fullilove v. Klutznick*, 448 U.S. 448, 480-482 (1980) (opinion of Chief Justice Burger).

The post-Civil War statutes comply with these criteria. They were specific responses to the urgent needs of newly freed slaves and provided benefits only to that group. The nature of the benefits conferred, e.g., food, health care, public land and education, did not deprive any other person. They functioned in the manner of present-day public disaster relief statutes.²²

²¹ See also *De Funis v. Odegaard*, 416 U.S. 312, 336-337 (1974) (Douglas, J., dissenting):

There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color.

²² See generally, R.W. Patrick, *The Reconstruction of the Nation* (1967); K.M. Stampp, *The Era of Reconstruction, 1865-1877* (1965); J.H. Franklin, *Reconstruction: After The Civil War* (1961).

Programs that employ racial or ethnic criteria, even in a remedial context, are subject to the most searching examination. *Fullilove v. Klutznick*, 448 U.S. 448, 472, 491-492 (1980) (opinion of Chief Justice Burger); see also 448 U.S. at 507 (Powell, J., concurring) (racial classification involves a test "virtually impossible to satisfy"), *Regents of the University of California v. Bakke*, 438 U.S. 265, 357 (1978) (opinion of Brennan, J.); *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting) ("... classifications based upon race, alienage, and national origin, must be subjected to close judicial scrutiny, because it focuses upon generally immutable characteristics over which individuals have little or no control..."); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).²³

The few cases where racial classifications have been approved are consistent with the foregoing analysis. In *Fullilove v. Klutznick*, *supra*, a sharply divided Court affirmed an Act of Congress allocating 10% of federal funds for public works projects to identified minority businesses. The Court stated, "Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the remedial powers of Congress." 448 U.S. at 483. See also 448 U.S. at 473, 448 U.S.

²³ It has been suggested that a lesser standard of review should be employed when the white majority acts in a benign manner to discriminate in favor of minorities. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974). Justice Douglas rejected this contention in his dissent in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). After first observing that Harvard's voluntary affirmative action plan was not benign to the students displaced by it, *Id.* at 333, Justice Douglas explained that discrimination is constitutionally forbidden regardless of whether it is wielded by the majority or the minority and irrespective of the motives behind it.

If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality.

Id. at 343.

at 516 (Powell, J., concurring). In addition, the Court noted that the impact on nonparticipants would be limited to disappointed expectations of sharing in the special fund. *Id.* 448 U.S. at 484. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), involved an express Congressional mandate redistricting voting districts along racial lines; no person was deprived of his right to vote as a result of the legislation. Similarly, in *Morton v. Mancari*, 417 U.S. 535 (1974), the "preference" granted Indians seeking employment in the Bureau of National Affairs, which the Court found to be a reasonable job qualification and not a preference at all, was enacted by Congress as part of the Indian Reorganization Act.²⁴

Finally, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25 (1971), in approving the use of mathematical ratios of black to white students to implement a school desegregation program, the Court underscored the flexibility of the ratio and concluded that if the quota were to be employed in an inflexible manner, the Court would reverse it as unconstitutional. Moreover, as Justice Douglas subsequently noted, the *Swann* desegregation program would not deny any child the right to attend public school and was therefore quite unlike a quota affecting careers in employment which directly infringe constitutional rights. *DeFunis v. Odegaard*, 416 U.S. 312, 336 n. 18 (1974) (Douglas, J., dissenting).

In 1915, the Court ruled that the Equal Protection Clause could not be interpreted to deny a white petitioner the right to employment:

²⁴ Both *Korematsu v. United States*, 323 U.S. 214 (1944) and *Hirabayashi v. United States*, 320 U.S. 81 (1943), which imposed discriminatory restrictions on Americans of Japanese extraction and are of questionable vitality, involved emergency legislation passed in time of war and have been distinguished on that ground. *DeFunis v. Odegaard*, 416 U.S. 312, 339 n. 20 (1974) (Douglas, J., dissenting). In addition, both cases were decided before the Court held that the Fourteenth Amendment was applicable to the actions of the federal government. *Fullilove v. Klutznick*, *supra*, 448 U.S. at 524 n. 3 (Stewart, J., dissenting).

It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762; *Barbier v. Connolly*, 113 U.S. 27, 31; *Yick Wo v. Hopkins*, *supra*; *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 590; *Coppage v. Kansas*, 236 U.S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

Truax v. Raich, 239 U.S. 33, 41 (1915). *Accord: In re Griffiths*, 413 U.S. 717 (1973). The boundaries of permissible reverse discrimination have not been expanded since that time. The quotas and race conscious remedies ordered by the court below are unconstitutional.

B. Bills of Attainder and Corruption of Blood

"Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." *Fullilove v. Klutznick*, 448 U.S. 448, 530 n. 12 (1980) (Stewart, J., dissenting). By barring innocent white workers from union eligibility and denying them equal access to training programs, the relief affirmed below penalizes innocent white persons on the basis of other white persons' history of racial discrimination.

As a result, the construction of Title VII adopted by the Court of Appeals has the effect of making the Civil Rights Act an unconstitutional bill of attainder, visiting upon white persons the sins of past discrimination by others. This is contrary to basic principles of individual accountability, and is specifically outlawed by the prohibition against bills of attainder and corruption of blood contained in the body of the Constitution as originally written. See art. I, §9, cl. 3 and art. III, §3, cl. 2 of the Constitution.

Bills of attainder legislatively determine or presume guilt and punish either specific individuals or groups of persons, without the protections of a judicial trial. *Selective Ser. Sys. v. Minn. Public Int. Research*, 104 S. Ct. 3348, 3353 (1984); *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977); *United States v. O'Brien*, 391 U.S. 367, 383 n. 30 (1968); *United States v. Lovett*, 328 U.S. 303, 315 (1946).

Originally limited to legislation that imposed capital punishment or incarceration of identifiable persons or groups, bills of attainder were recognized by Chief Justice Marshall in 1810 to include a broad range of punitive measures: "A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810). Accord: *Nixon v. Administrator of General Services*, 433 U.S. 425, 538 (1977) (Chief Justice Burger, dissenting); *United States v. Lovett*, 328 U.S. 303, 315-316 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867) (punishment under a bill of attainder includes the "deprivation of any rights, civil or political, previously enjoyed. ..."); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 286 (1827) (constitutional prohibition against bills of attainder "is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property.")

The practice of "corruption of blood," abolished by art. III, §3, cl. 2, continued the punishment to the heirs of the person attainted. This Court has repeatedly voiced its objection to such discriminatory legislation. *County of Oneida v. Oneida Indian Nation of New York*, 105 S. Ct. 1245, 1272 n. 31 (1985) (Stevens, J., dissenting) ("The Framers recognized that no one ought be condemned for his forefathers' misdeeds. ..."); *King v. Smith*, 392 U.S. 309, 336 n. 5 (1968) (Douglas, J., concurring); *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 290 (1968) (Douglas, J., dissenting); In *Korematsu v. United States*, 323 U.S. 214, 243 (1944), Justice Jackson, dissenting from the wartime restrictions imposed on Japanese-Americans, stated:

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.

Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him. ... But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.

Guided by these fundamentals of our jurisprudence, the Court has declared unconstitutional legislation that abridged the rights of classes of individuals to employment. *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Lovett*, 328 U.S. 303 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867). The broad orders of reverse discrimination entered in this case are unconstitutional.

III

THE DISTRICT COURT'S USE OF STATISTICAL EVIDENCE VIOLATED TITLE VII AND PETITIONERS' RIGHTS

The district court's 1975 finding that appellants violated the Civil Rights Act is the underpinning for all the proceedings which have followed. As a part of those findings, the court determined that the appropriate minority membership in Local 28 was 29%, which the court found was the percentage of minorities within the borders of the City of New York (A-353) and fixed the quota accordingly. Two years later, this Court decided *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and held that: (1) events which predated the Civil Rights Act of 1964 could not be used as evidence of the Act's violation; and (2) proof of a pattern of discrimination by statistical evidence must be logically consistent and must be drawn from relevant geographical locations. The 1975 decision violated both of these requirements. This violation was the basis of Judge Meskill's subsequent dissent and suggestion that the original findings be overturned. Inasmuch as petitioners have now been held in contempt for not achieving

the quota, the propriety of the evidence upon which it was derived is relevant.²⁵

Moreover, as Judge Meskill pointed out, any hiring goal percentage must be calculated in accordance with the dictates of *Hazelwood*: "[I]f the district court fixes the proper figure for determining the existence of discrimination, then it logically follows that the same figure is the appropriate target in any affirmative action plan imposed" (A-178).

Because members and applicants for Local 28 membership are, and always have been, drawn from areas outside of New York City (A-186, 236), the percentage quota fixed by the district is and always has been, erroneous. There is no evidence in the record from which the correct percentage could be derived, but it is apparent that the statistical error is significant.²⁶

The misuse of statistics was repeated in the 1982 contempt finding. Proof of the only charge which could be construed as a discriminatory practice, the underutilization of the apprentice program, was based upon statistics which all parties and the Court of Appeals agreed were misunderstood and misapplied by the district court. The issue is discussed in both opinions (A-15-16, 43).

²⁵ In civil contempt, the underlying orders are also before the reviewing court and, if the orders are found to be invalid or unconstitutional, the contempt falls with the orders. *United States v. United Mine Workers*, 330 U.S. 258, 295 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); *Worden v. Searls*, 121 U.S. 14, 25 (1887).

²⁶ In the related case of *Equal Employment Opportunity Commission v. Local 14*, 553 F.2d 251 (2d Cir. 1977), the Court of Appeals found that the proper hiring goal was only 16.2% (as opposed to 29% here), reflecting a minority percentage in the same labor pool which included areas from outside New York City. 553 F.2d at 254. From 1965 until 1974, Local 28 admitted a nonwhite membership of 10.06% (A-325). Using the statistical method explained in *Castaneda v. Partida*, 430 U.S. 482, 496-497 n.17 (1977), and followed in *Hazelwood*, 433 U.S. at 311 n.17, the difference between 16.2% and 10.06% would be barely significant, even without taking into consideration the extremely depressed conditions in the construction industry in New York during the relevant period (A-175). Thus, if correct statistics had been employed by the district court in 1975, it is likely that the complaint would have been dismissed.

Misuse of statistics has permeated this case since the original findings in 1975. Statistics were used to confirm the original finding of discrimination, to fix the desired minority membership which became the quota, and finally to establish contempt. In each instance, the statistics employed were wrong. As this Court stated in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977):

We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances.

In these circumstances, the wrongful use of statistics has affected basic rights.

IV

THE SANCTIONS IMPOSED IGNORE THE DIFFERENCES BETWEEN CIVIL AND CRIMINAL CONTEMPT AND DENY DUE PROCESS TO PETITIONERS

Petitioners are before this Court seeking review of two orders of civil contempt. Both contempt proceedings were consistently characterized as civil, but the remedies imposed were punitive. Punitive contempt remedies may only be imposed in criminal contempt proceedings maintained under Rule 42, Fed. R. Crim. P., in which the defendant is afforded the due process protections applicable to criminal proceedings. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *United States v. United Mine Workers*, 330 U.S. 258, 296-297 (1947); *Nye v. United States*, 313 U.S. 33 (1941); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444-448 (1911).

Section 1101 of the Civil Rights Act of 1964 [42 U.S.C. §2000h] is a specific provision governing criminal contempt proceedings under the Act. This statute imposes the additional protection of trial by jury for criminal contempt proceedings brought under the Act. In pertinent part, it provides:

In any proceeding for criminal contempt arising under title II, III, IV, V, VI, VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than \$1,000 or imprisoned for more than six months.

• • •

Nor shall anything herein be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

The distinction between civil and criminal contempt as set forth in this statute is consistent with the pronouncements of the Court for contempts not involving the Civil Rights Act. Judicial sanctions for civil contempt are wholly remedial and may be imposed only to compel compliance with prior orders of the court or to compensate the complaining party for actual losses proved to have been suffered. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *United States v. United Mine Workers*, *supra*; *Penfield Co. of California v. S.E.C.*, 330 U.S. 585, 590 (1947). Under the statute, civil contempt relief may only be granted for the former purpose: "to secure compliance with or prevent obstruction of ..." court orders; damages are not anticipated.

If the Court were to read the statute broadly and imply the power to award compensatory fines, the strictures for such damages would be as set forth in *United States v. United Mine Workers*, *supra*:

Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.

Id. 330 U.S. at 304. *See also, McCrone v. United States*, 307 U.S. 61, 64 (1939) ("the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public"); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 451 (1911) ("this was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant."); *Worden v. Searls*, 121 U.S. 14, 25 (1887).

Similarly, a coercive civil contempt remedy must be tailored to achieve obedience of the court's orders and nothing more, and thus the contemnors must be given an opportunity to purge the contempt. *Penfield Co. v. S.E.C.*, 330 U.S. 585, 590 (1947); *United States v. United Mine Workers*, *supra*, 330 U.S. at 331-332 (opinion of Black, J.); *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U.S. at 442.

The judicial power to punish contempt is broad, but not unlimited. In fashioning contempt remedies courts may never exercise more than "the least possible power adequate to the end proposed." *In re Michael*, 326 U.S. 224, 227 (1945); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). As stated in *Gompers*, "the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper." 221 U.S. at 451.

The district court's remedies in the present case far exceed the foregoing standards. The penalties are not compensatory because nothing is payable to any complainant or related to any actual loss. No evidence of actual loss was offered, and no findings of actual loss were made by the district court. Similarly, the punishments were not coercive because petitioners did not have it within their power to comply with any order and end their contemptuous status.

The Court of Appeals sustained the remedies by ruling that if the sanctions can be said to have compensatory or coercive "components", then the inquiry ends without even examining other aspects of the penalty which clearly have neither feature. Thus, for example, the Court of Appeals did not even mention

the requirement, as a civil contempt remedy, that petitioners computerize their records.

The purported justification for the sanctions by the Court of Appeals reflects a clear understanding that petitioners were held in contempt for failure to achieve the quota.²⁷ The court found that the penalties were proper because they were designed to coerce the petitioners into achieving the 29% membership goal – not to comply with the largely ministerial failures upon which the contempt was purportedly premised (A-25-26).

Similarly, the compensatory element identified by the Court of Appeals, the Fund created to raise the educational level of persons of minority extraction who might be interested in joining the sheet metal industry,²⁸ is unrelated to any stated contempt charge. Clearly, the Fund does not compensate any party to the proceeding, none of whom proved actual losses.

In actuality, the fines ordered below were criminal remedies. In distinguishing between civil and criminal contempt, the character and purpose of the punishment imposed is determinative. *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U.S. at 441. Where the fines do not provide any relief to a private litigant but are aimed broadly to vindicate the public interest, they are punitive, criminal contempt remedies. *Nye v. United States*, 313 U.S. 33, 43 (1941); *Penfield Co. v. S.E.C.*, 330 U.S. 585, 590 (1947); *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U.S. at 443-444.

All parties concede that petitioners were not afforded the Due Process safeguards required in criminal contempt proceedings:

²⁷ In his dissent, Judge Winter reasons with compelling logic that petitioners were in reality held in contempt solely for their failure to meet the 29% racial quota (A 38-48).

²⁸ Judge Winter observed in his dissent that the Fund order has the effect of holding "Local 28 responsible for improving the quality of public education in New York" (A-50).

For, notwithstanding the many elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself.²⁹

* * *

There was therefore a departure – a variance between the procedure adopted and the punishment imposed, when, in answer to a prayer for remedial relief, in the equity cause, the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as if in an action of "A vs. B for assault and battery," the judgment entered had been that defendant be confined in prison for twelve months.

Gompers v. Bucks Stove & Range Co., *supra*, 221 U.S. at 444, 449.

V

THE OFFICE OF ADMINISTRATOR IS AN IMPROPER JUDICIAL CREATION

A. *The Administrator Is An Unjustifiable Interference with the Right of Union Self-Government*

The appointment of an Administrator possessed with "broad powers ... to exercise day-to-day oversight of the union's affairs" (A-220), and the continuation of his office in AAAPPO, constituted an unreasonably intrusive remedy and an unwarranted denial of the union's right to self-government. Judge Winter, in his dissent below, accurately characterized the extent of the intrusion:

²⁹ In a criminal contempt proceeding under the Civil Rights Act, a defendant is also entitled to trial by jury (see pp. 37-38, *supra*).

[The O & J and RAAPO] constitute a complex code of conduct encompassing forty-five pages of substantive and procedural detail with regard to admission to the apprenticeship program, membership in Local 28 and job referral in the sheet metal industry. The O & J and RAAPO vest direct control over these matters in the administrator, who is in effect a receiver with power, *inter alia*, to govern Local 28 so far as the recruitment and admission of minorities to the union and the referral of apprentices to jobs are concerned (A-38).

There was no basis for placing Local 28 in receivership in 1975 for there was no reason for the court to assume that Local 28 would disobey what could have been much simpler orders. By 1975, Local 28 had an established record of adherence to orders. The original civil rights violations were largely the result of Local 28's having adhered to the 1964 state court order (see pp. 4-5, *supra*). Moreover, prior to the trial of the federal action, Local 28 had obeyed an interlocutory federal court order requiring it to indenture twenty nonwhites. The union objected to the order (which seems well beyond the court's powers under Title VII or the Equal Protection Clause), but the order was obeyed (A-352).

The district court was required to fashion the least intrusive remedy to rectify past discrimination. *Dayton Board of Educ. v. Brinkman*, 433 U.S. 406, 419-420 (1977); *Hills v. Gautreaux*, 425 U.S. 284, 293-294 (1976); *Milliken v. Bradley*, 418 U.S. 717, 744 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *See generally*, Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COL. L. REV. 784, 864-869 (1978). If a plan is necessary to bring a private institution into compliance, the managers of the institution must be given primary responsibility for formulating it. *See United States v. American Tobacco Co.*, 221 U.S. 106, 187-188 (1911); *cf. Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 54 (1981) (White, J., dissenting in part) ("In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed").

Judicial restraint is particularly required in cases involving labor organizations.³⁰ The Congress that enacted the Civil Rights Act of 1964 was concerned that the legislation might interfere with the internal operations of unions. In exchange for labor support for the Act, assurances were expressly given that the Act could not be so interpreted. *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979). A House Report thus promised that Title VII would leave "management prerogatives and union freedoms undisturbed to the greatest extent possible." "Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963), *reported in* U.S. Code Cong. & Ad. News 1964, p. 2391.

In the Senate, Senator Metcalf introduced "Some Questions and Answers on the Civil Rights Bill," an interpretative pamphlet, prepared by the Leadership Conference on Civil Rights, which contained the following catechism:

Does the provision give the Government any control over the affairs of unions?

No. It simply bars unions from denying or limiting membership to anyone or keeping them from a job because of race, color, religion, sex, or national origin. 110 Cong. Rec. 7711-7712.

Senator Humphrey's remarks on the issue of union autonomy were to the same effect. Title VII, he stated, "contains no provisions which would jeopardize union seniority systems, nor would anything in the title permit the Government to control the internal affairs of employers or labor unions." 110 Cong. Rec. 11848.³¹

³⁰The Labor Management Reporting and Disclosure Act of 1959 was enacted after Congress made specific findings that the federal government should protect the rights of employees to self government. 29 U.S.C. §401(a).

³¹ Similarly, the legislative history of the Labor Management Reporting and Disclosure Act of 1959 reflects an attempt to balance legislation designed to

(footnote continued)

In the present case, the appointment of an Administrator depriving Local 28 of its autonomy was unwarranted. Moreover, the practice of making such appointments without exhausting less intrusive remedies has become quite common, particularly in cases involving labor organizations.³² The Court should terminate the office of Administrator.

remedy revealed abuses in union elections without departing from long-standing policy against governmental intrusion into internal union affairs:

In acting on this bill [S. 1555] the committee followed three principles: 1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. * * * [I]n establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents. 2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. * * * 3. Remedies for the abuses should be direct. * * * [T]he legislation should provide an administrative or judicial remedy appropriate for each specific problem.

S.Rep. No. 187, 86 Cong. 1st Sess., 7 reprinted in 1959 U.S. Code Cong & Ad. News 2318, 2323. See also *ibid*: "The bill reported by the committee, while it carries out all the major recommendations of the Senate select committee, does so within a general philosophy of legislative restraint." See generally Cox, *Internal Affairs of Labor Unions Under The Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960).

³² See, e.g., *Equal Employment Opportunity Commission v. Local 14, International Union of Operating Engineers*, 553 F.2d 251, 257-258 (2d Cir. 1977); *Rios v. Enterprise Association of Steamfitters, Local 638*, 501 F.2d 622, 626 (2d Cir. 1974); *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 507 F. Supp. 1146, 1151 n. 6 (E.D. Pa. 1980), *aff'd*, 648 F.2d 923 (3d Cir. 1981), *reversed on other grounds*, 458 U.S. 375 (1982); *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, 384 F. Supp. 585, 594 (S.D.N.Y. 1974); *aff'd*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); *United States v. United States Steel Corp.*, 371 F. Supp. 1045, 1057 (N.D. Ala. 1973) *modified*, 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *United States v. Bethlehem Steel Corp.*, 6 Fair Empl. Prac. Cas. (BNA) 1073 (W.D.N.Y. 1973); *United States v. Wood, Wire and Metal Lathers International Union, Local Union 46*, 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973); *United States v. Local No. 86, International Association of Bridge, Structural, Ornamental & Reinforcing Ironworkers*, 315 F. Supp. 1202, 1247-1250 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971). See also, Harris, *The Title VII Administrator: A Case Study In Judicial Flexibility*, 60 CORN. L. REV. 53 (1974).

B. *The Powers Delegated to the Administrator Are Beyond Those of a Special Master And Resulted In An Abdication of Judicial Power.*

The Administrator is a special master appointed under Rule 53, Fed. R. Civ. P. An administrator with the expansive powers here exercised, however, cannot be justified. It is an abdication of the judicial function. *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927); *TPO, Inc. v. McMillan*, 460 F.2d 348 (7th Cir. 1972).

The delegation of judicial power was contrary to the teachings of *LaBuy v. Howes Leather Co.*, *supra*, and in violation of art. III, §1 of the Constitution.³³ Only judges serving under art. III, §1 may exercise the judicial power of the United States, *Northern Pipeline Construction v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982), and only they are empowered to determine the law. See e.g. *Glidden Co. v. Zdonak*, 370 U.S. 530, 549-552 (1962); *Crowell v. Benson*, 285 U.S. 22, 51 (1932); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

A special master may decide facts, but a judge must determine legal issues. See, *Crowell v. Benson*, *supra*; *Reed v. Cleveland Board of Education*, 607 F.2d 737, 747 (6th Cir. 1979); *TPO, Inc. v. McMillan*, 460 F.2d 348 (7th Cir. 1972); *Reed v. Board of Election Comm'rs*, 459 F.2d 121 (1st Cir. 1972). A special master should, therefore, be appointed only to help the court in a case in which the help is needed, and his appointment and

³³ Article III, §1 provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

activities are only for the purpose of assisting the court to obtain facts and to arrive at a correct result. See, e.g., *Kimberly v. Arms*, 129 U.S. 512, 523-524 (1889).³⁴

The fact that the decisions of the Administrator were "appealable" does not remedy the abdication of judicial power. Control of the litigation must be maintained by the court, and appellate review is insufficient to satisfy this requirement. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 86 n. 39 (1982); *United States v. Raddatz*, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring).

In the present case, even the factual issues referred to the Administrator were excessive. In pertinent part, Rule 53(b), Fed. R. Civ. P., provides:

A reference to a master shall be the exception and not the rule in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

Here, after the initial findings had been made by the district court, every issue was referred to the Administrator. As the Court ruled in *LaBuy v. Howes Leather Co.*, *supra*, in which the issuance of a writ of mandamus to vacate an improper reference to a master was affirmed:

The use of masters is "to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause," *Ex parte Peterson*, 1920, 253 U.S. 300, 312, 40 S. Ct. 543, 547, 64 L.Ed. 919, and not to displace the court.

352 U.S. at 256.

³⁴ Rule 53 comports with this principle. Its history indicates that it was written in contemplation of references of fact only. See, Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COL. L. REV. 452, at 455 n.18 (1958); See also Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1272 (citing *Ex parte Peterson*, 253 U.S. 300 (1920)).

CONCLUSION

Petitioners respectfully pray that the judgment of the United States Court of Appeals for the Second Circuit be reversed; that all outstanding orders and judgments be vacated, and that the underlying proceedings be dismissed.

Dated: New York, New York
December 6, 1985

Respectfully submitted,

MARTIN R. GOLD
Counsel of Record
ROBERT P. MULVEY
HUGH M. MCGOVERN
GOLD, FARRELL & MARKS
595 Madison Avenue
New York, New York 10022
(212) 935-9200

Attorneys for Petitioners

WILLIAM ROTHBERG
POPKIN & ROTHBERG
16 Court Street
Brooklyn, New York
(718) 624-2200

Co-Counsel for Local 28 JAC

EDMUND P. D'ELIA
655 Third Avenue
New York, New York
(212) 697-9895

Co-Counsel for Local 28
and Local 28 JAC

STATUTORY APPENDIX

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STATUTORY APPENDIX

Article I, §9, cl. 3 of the United States Constitution provides:

No Bill of Attainder or ex post facto Law shall be passed.

Article III, §3, cl. 2 of the United States Constitution provides:

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

The Fifth Amendment to the United States Constitution provides in pertinent part:

No Person shall ... be deprived of life, liberty, or property, without due process of law

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

No state shall ... deny to any person within its jurisdiction the equal protection of the laws.

Section 703(c) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(c) provides in pertinent part:

It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any

way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin....

Section 703(d) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(d) provides:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Section 703(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j), provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(g), provides in pertinent part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), [or any other equitable relief as the court deems appropriate.]

Section 1101 of the Civil Rights Act of 1964, 42 U.S.C. §2000h, provides in pertinent part:

In any proceeding for criminal contempt arising under title II, III, IV, V, VI, or VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than \$1,000 or imprisoned for more than six months.

* * *

Nor shall anything herein be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

Section 401(a) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401(a) provides in pertinent part:

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection.

Rule 53(b), Fed. R. Civ. P., provides in pertinent part:

Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

RESPONDENT'S BRIEF

No. 84-1656

Supreme Court, U.S.

FILED

DEC 9 1985

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

**LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION AND LOCAL 28
JOINT APPRENTICESHIP COMMITTEE, PETITIONERS**

v.

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, ET AL.**

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**BRIEF FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

CHARLES FRIED

Solicitor General

WM. BRADFORD REYNOLDS

Assistant Attorney General

CAROLYN B. KUHL

Deputy Solicitor General

SAMUEL A. ALITO, JR.

Assistant to the Solicitor General

BRIAN K. LANDSBERG

MICHAEL CARVIN

DENNIS J. DIMSEY

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

JOHNNY J. BUTLER

Acting General Counsel

Equal Employment Opportunity Commission

Washington, D.C. 20507

QUESTIONS PRESENTED

1. Whether the contempt remedies awarded in this case were procedurally defective penalties for criminal contempt.

2. Whether the proof in this case supported the 1982 contempt finding and findings of intentional discrimination made in 1975 and sustained on appeal in 1976 and 1977.

3. Whether the district court abused its discretion in appointing an administrator in 1975 to supervise compliance with its orders in this case and in continuing his term of office in 1983.

4. Whether as a remedy in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or as a civil contempt remedy for violation of a Title VII judgment, a court may award preferences based solely on race or ethnic background, rather than on the beneficiary's status as an actual victim or discrimination.

5. Whether such remedies are unconstitutional.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1656

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION AND LOCAL 28
JOINT APPRENTICESHIP COMMITTEE, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, ET AL.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

**BRIEF FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A52) is reported at 753 F.2d 1172. The district court's order of August 16, 1982 (Pet. App. A149-A159) holding petitioners in contempt is reported at 29 Fair Empl. Prac. Cas. (BNA) 1143. The district court's other orders relating to contempt (Pet. App. A125-A148), its order establishing an employment, training, education, and recruitment fund (Pet. App. A113-A118), and its Amended Affirmative Action

Plan (Pet. App. A53-A107) and order (Pet. App. A111-A112) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1985. The petition for a writ of certiorari was filed on April 16, 1985, and was granted on October 7, 1985. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1971, the United States initiated this action in the United States District Court for the Southern District of New York against petitioners (Local 28 of the Sheet Metal Workers' International Association and the Local 28 Joint Apprenticeship Committee (JAC)) and three other locals and their apprenticeship committees. The action was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, for the purpose of enjoining a pattern and practice of discrimination against nonwhites in union membership.¹

After a trial in 1975, the district court found that petitioners had purposefully denied nonwhites membership in the union in violation of Title VII (see Pet. A317-A363). The district court entered an order and judgment (O&J) (*id.* at A300-A316) and Affirmative Action Program and Order (AAPO) (*id.*

¹ The Equal Employment Opportunity Commission was substituted as plaintiff before trial, and the City of New York intervened as a plaintiff. The New York State Division of Human Rights was named by the union as a third party defendant but realigned itself with the plaintiffs. The Sheet Metal and Air Conditioning Contractors' Association of New York City was added as a defendant (Pet. App. A210 n.3).

at A230-A299) as remedies for the violation. Among other things, petitioners were ordered to take steps to recruit more nonwhite members and to achieve a nonwhite membership goal of 29% by July 1, 1981 (*id.* at A232, A305). Interim percentage goals were also set (*ibid.*), and an administrator was appointed to supervise compliance with the court's orders (*id.* at A305-A307).

On appeal, the court of appeals in 1976 affirmed the district court's finding that the defendants had "consistently and egregiously" violated Title VII but reversed part of the relief ordered in the O&J and AAPO (Pet. App. A207-A229). On remand, the district court entered a revised Affirmative Action Plan and Order (RAAPO) containing an ultimate goal of 29% nonwhite membership by July 1, 1982, as well as revised interim goals and other provisions aimed at increasing nonwhite membership, largely through the use of the union's apprenticeship program (*id.* at A182-A206). A divided panel of the court of appeals subsequently affirmed the RAAPO (*id.* at A160-A181).²

2. In April 1982, the City and State of New York moved that petitioners be held in contempt for failure to comply with O&J, the RAAPO, and two orders of the administrator (Pet. App. A8). After a hearing, the court entered orders of contempt based on five "separate actions or omissions" that had "impeded the entry of non-whites * * * in contravention of the prior orders of [the] court" (*id.* at A9; see *id.* at A149-A157). These were "(1) adoption of a policy of underutilizing the apprenticeship program to the

² Judge Meskill dissented on the ground that the initial finding of liability was based on improper statistical proof (Pet. App. A169-A181).

detriment of nonwhites; (2) refusal to conduct the general publicity campaign ordered as part of the recruitment program in RAAPO; (3) adoption of a job protection provision in their collective bargaining agreement that favored older workers and discriminated against nonwhites (older workers' provision); (4) issuance of unauthorized work permits to white workers from sister locals; and (5) failure to maintain and submit the records and reports required by RAAPO, the O&J [order and judgment], and the administrator" (Pet. App. A9). The court imposed a fine of \$150,000 to be placed in a training fund to increase nonwhite membership in the union's apprenticeship program (*id.* at A156).

A year later, the City of New York again instituted contempt proceedings, this time before the administrator. The administrator concluded that petitioners were in contempt of outstanding court orders requiring them to provide records, to furnish accurate data, and to serve copies of the O&J and the RAAPO on contractors who hired their members. As a remedy, the administrator suggested that petitioners pay for computerized record keeping and make further payments to the training fund (Pet. App. A127-A148). The district judge adopted the administrator's recommendations (*id.* at A125-A126).

3. In September 1983, the district court entered two more orders. One adopted the administrator's proposal for the establishment of a fund exclusively for the benefit of nonwhites (Pet. App. A113-A118). This fund is financed by the fines previously imposed upon petitioners, as well as an assessment of \$.02 per hour to be paid by petitioner Local 28 for every hour of work done by a journeyman or apprentice (*id.* at A115). All expenses of the fund must be paid

by petitioner JAC (*ibid.*). Among other things, the fund is used to train and counsel nonwhite apprentices and to provide stipends and low-interest loans to needy nonwhite apprentices (*id.* at A116-A118). The order did not require that the beneficiaries be the actual victims of the union's past discrimination.

The other order adopted an Amended Affirmative Action Plan and Order (AAAPO) (Pet. App. A111-A112), which made six significant changes in the RAAPO: (1) it required computerized record keeping; (2) it extended the affirmative action provisions to locals and their JAC's that had merged with Local 28; (3) it required that one nonwhite apprentice be indentured (*i.e.*, admitted to the apprenticeship program) for every white indentured; (4) it ordered that contractors employ one apprentice for every four journeymen; (5) it eliminated the apprentice aptitude exam and replaced it with a three-person selection board; and (6) it established a nonwhite membership goal of 29.23% that must be met by August 31, 1987 (*id.* at A53-A107; see *id.* at A12). As the court of appeals later explained, the AAAPPO was adopted in response to three developments in this case (*id.* at A28): "first, Local 28's failure to meet the 29% nonwhite membership goal by July 1, 1982; second, Local 28's contemptuous refusal to comply with many provisions of RAAPO; and third, the merger of several largely white locals outside New York City into Local 28."

4. A divided panel of the court of appeals held that petitioners had been properly adjudged in contempt and upheld all of the contempt penalties assessed against them. The court also sustained the AAAPPO with a few modifications (Pet. App. A1-A52).

a. The court of appeals upheld four of the five findings on which the district court's first holding of

contempt was based and concluded that these findings provided a sufficient basis for contempt (Pet. App. A13-A20). The court rejected petitioner's argument that certain of the alleged violations were moot or time barred (*id.* at A14-A15). While acknowledging that the important finding of underutilization of the apprenticeship program was based in part on a misunderstanding of the statistics, the court concluded that the finding was supported by sufficient additional evidence (*id.* at A15-A17). The court reversed the finding that the adoption by petitioners and the Contractors' Association of a provision favoring the employment of older workers constituted contumacious conduct, since that provision was never implemented (*id.* at A18).³

b. The court of appeals similarly affirmed the district court's second holding of contempt (Pet. App. A20-A24), finding that it was supported by "clear and convincing evidence which showed that defendants had not been reasonably diligent in attempting to comply with the orders of the court and the administrator" (*id.* at A22). The court of appeals rejected petitioner's contention that one of the violations found by the district court was based on inadmissible hearsay, that some of the violations were de minimis, and that others were barred by laches (*id.* at A20-A22).

c. The court of appeals also rejected petitioners' argument that the contempt remedies were punitive and therefore could be imposed only after a criminal proceeding (Pet. App. A25-A27). The court found

³ Since this was the only contemptuous conduct found to have been committed by the Contractors' Association, the court of appeals vacated all contempt relief against the Association (Pet. App. A19-A20).

that the fund order was compensatory because its "purpose was to compensate nonwhites, not with a money award, but by improving the route they most frequently travel in seeking union membership" (*id.* at A26). The court also observed that the fund order was coercive because it was to remain in effect until the 29.23% goal was achieved (*id.* at A27).⁴

d. The court of appeals likewise rejected most of petitioners' challenges to the AAAPPO, and the court held that the AAAPPO did not violate Title VII or the Constitution (Pet. App. A27-A37). The court concluded that *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206 (June 12, 1984), did not require reversal of the AAAPPO because: (1) unlike the order in *Stotts*, the AAAPPO does not conflict with a bona fide seniority plan; (2) the discussion in *Stotts* of Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), applied only to "make whole" relief and did not address the kind of prospective relief contained in the AAAPPO and the fund order; and (3) this case, unlike *Stotts*, involves intentional discrimination (Pet. App. A30-A31).

After rejecting a claim that the AAAPPO interfered with union self-government,⁵ the court of appeals considered the six changes made by the AAAPPO. The court ruled that the 29.23% nonwhite membership objective was not a permanent quota but a temporary "permissible goal" (Pet. App. A31-A33). This goal, the court stated, was a remedy for Local 28's "long-

⁴ The court of appeals rejected the argument that reversal of the contempt finding based on the older workers' provision made it necessary to vacate the fund order; the court found that "the remedies ordered are amply warranted by the other findings of contempt" (Pet. App. A27).

⁵ The court noted that it had rejected this contention in previous appeals in this case (Pet. App. A31).

continued and egregious racial discrimination," and added that the goal "will not unnecessarily trammel the rights of any readily ascertainable group of non-minority individuals" (*id.* at A31-A32).⁴ The court of appeals upheld a hiring ratio of one apprentice to every four journeymen as necessary to prevent underutilization of the apprenticeship program, the focal point of the AAAPPO's integration efforts (*id.* at A33-A34). The court of appeals also approved the creation of a three-person apprenticeship selection board to replace the apprentice selection exams ordered by RAAPPO (*id.* at A34-A35). The AAAPPO had abandoned these tests because they had an adverse impact on minorities, because of persistent disagreement about their validity, and because they were too costly to administer (*id.* at A35-A36).

Finally, the court of appeals held that the district court had abused its discretion by requiring the selection of one nonwhite for every white who enters the apprenticeship program (Pet. App. A36-A37). The court noted that the defendants had indentured 45% nonwhites in apprenticeship classes since January 1981 and that "there is no indication that defendants will in the future deviate from this established, voluntary practice" (*id.* at A37). Furthermore, the court reasoned that the new selection board will oversee the apprenticeship selection process and insure that nonwhites are selected (*ibid.*).

Judge Winter dissented (Pet. App. A38-A52), observing that the majority failed "to address the fact that Local 28 had the approval of the administrator

⁴ The court of appeals rejected New York City's claim that the 29.23% goal was too low, finding that this figure was not a clearly erroneous measure of the minority labor pool (Pet. App. A33).

for every act it took that affected the number of minority workers entering the sheet metal industry" (*id.* at A38). Judge Winter argued that statistics in the record refuted the district court's finding that the apprenticeship program had been underutilized (*id.* at A42-A48). Noting the depressed economics of the sheet metal industry, he stated (*id.* at A48) that "reactive finger pointing at Local 28 is a faintly camouflaged holding that journeymen should have been replaced by minority apprentices on a strictly racial basis" and that such a requirement "is at odds with [*Stotts*], which rejected such a use of racial preference as a remedy under Title VII." Judge Winter also disagreed with the required establishment of the training and education fund (*id.* at A48-A52).

SUMMARY OF ARGUMENT

Petitioners in this case are a union and a union apprenticeship committee that were found to have violated Title VII of the Civil Rights Act of 1964 by engaging in discrimination against nonwhites in admission to the union. Petitioners were required, among other things, to cease their discriminatory practices (to take steps to attract nonwhite members, and to achieve a 29% nonwhite union membership goal. Some years later, after finding that petitioners had violated numerous remedial provisions, including the 29% nonwhite membership requirement, the district court held petitioners in contempt and levied heavy fines. The court also ordered the union, on pain of fines that would threaten its very existence, to achieve a 29.23% nonwhite membership "goal" by August 31, 1987, and to establish, finance, and operate a training fund exclusively for the benefit of nonwhite apprentices. Petitioners challenge their

contempt citations, the appointment of an administrator with broad powers over their day-to-day operations, and the race-restricted relief approved by the lower courts.¹

We disagree with petitioners' contention that the contempt sanctions imposed by the district court were punitive and that the procedures for criminal contempt (Fed. R. Crim. P. 42(b)) should have been followed. The sanctions at issue were coercive and compensatory and thus are squarely in the mold allowed and routinely employed for civil contempt. The contempt citations, moreover, are adequately supported by findings that should not be disturbed.

Petitioners' challenge to the appointment and continued service of an administrator charged with supervising their compliance with the court's orders is not properly before the Court and, in any event, is clearly unsound.

Notwithstanding petitioners' patently contumacious conduct, we believe that the 29.23% membership "goal," which is actually a rigid quota, was improper. It is not clear whether the quota was entered exclusively as a Title VII remedy or whether it was also based to some degree on the district court's authority to impose sanctions for civil contempt. If the quota is purely a Title VII remedy, it is unlawful because, as this Court held in *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206 (June 12, 1984), Section 706(g) of Title VII prohibits the award of relief

¹ We are filing this brief at the time when petitioners' brief is due, although we disagree with petitioners on several of the questions presented, in order to give the other respondents the opportunity to respond to our arguments regarding race-restricted relief.

such as union membership to persons who are not the actual victims of illegal discrimination. There has been no showing here that the beneficiaries of the 29.23% membership quota are victims of petitioners' past discrimination.

The remedial principle recognized in *Stotts* is not limited to cases involving seniority rights, as the court of appeals believed. On the contrary, Section 706(g) governs all Title VII relief, not just relief affecting seniority rights. The court of appeals was also wrong in holding that *Stotts's* interpretation of Section 706(g) does not apply to "prospective" relief. By its express terms, Section 706(g) applies to forms of prospective relief such as hiring and promotion. Indeed, Section 706(g) expressly applies to the very form of relief at issue here—admission to union membership. Finally, there is no support for the court of appeals' bald assertion that *Stotts's* interpretation of Section 706(g) does not apply to cases of intentional discrimination.

Even if the 29.23% quota rests to some degree on the district court's civil contempt power, it is still invalid. We do not condone contempt; we applaud the use of firm measures to bring about compliance with court orders, especially in cases involving discrimination. We would urge the imposition of stern sanctions here. But it stands to reason that a court, in seeking to enforce a statute, should not impose a contempt remedy that is contrary to statutory policy. Thus, contempt sanctions imposed to enforce Title VII must not themselves violate the statute's policy of providing relief only to the actual victims of discrimination. This policy furthers the principle of nondiscrimination underlying Title VII and does not hinder a court's ability to sanction contemnors. The basis for this rule is not leniency toward contemnors or discrimi-

nators but the recognition that those disadvantaged by quotas are often innocent persons who are not guilty of either discrimination or contempt. In this case, for example, the 29.23% nonwhite membership quota disadvantages whites seeking to join the union. Since these individuals are not union members, they obviously cannot be blamed for the union's conduct.

For essentially the same reasons, we believe that the race-restricted fund order is improper. The fund is to "be used solely for the benefit of nonwhites" (Pet. App. A114) and, like the membership quota, its beneficiaries have not been shown to be victims of petitioners' discrimination. Far from satisfying the standards for judicial relief contained in Section 706 (g), the fund order, which in effect imposes a 100% nonwhite quota, does not even appear to satisfy the standards for a purely voluntary affirmative action program set out in *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

While Section 706(g) prohibits the sort of class-based relief exemplified by the 29.23% membership quota and the exclusion of whites from the fund programs, it is important to note that Section 706(g), which authorizes courts to "order such affirmative action as may be appropriate," gives courts extensive authority to impose a full range of corrective remedies, so long as this one remedial limitation is not violated. In this case, the appointment of an administrator to oversee petitioners' membership and apprenticeship practices is an example of appropriate affirmative relief. And while the fund order in its present form is improper, it would have been entirely appropriate for the court to have ordered petitioners to establish a fund to benefit the apprenticeship program *generally*. Such an order would not have con-

ferred employment or union membership on the basis of race yet would have served to correct petitioners' discriminatory practices, since the apprenticeship program is the route by which greater numbers of nonwhites can gain union membership.

ARGUMENT

I. PETITIONERS WERE PROPERLY ADJUDGED IN CIVIL CONTEMPT

Petitioners challenge the propriety of their contempt citations on two grounds. They contend, first, that the district court imposed criminal contempt sanctions without affording them the procedural protections of Fed. R. Crim. P. 42(b)^{*} and, second, that the contempt findings resulted from the district court's misuse of statistical evidence. These contentions provide no basis for vacating petitioners' contempt citations.

^{*} Fed. R. Crim. P. 42(b), which governs criminal contempt proceedings, provides in pertinent part as follows:

A criminal contempt * * * shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. * * * Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

It is undisputed that these procedures were not followed in this case (Pet. 16; Pet. App. A25).

A. The Sanctions Imposed Are Civil in Nature

Petitioners contend (Pet. 16-17) that the sanctions in this case, although ostensibly imposed for civil contempt, are in fact punitive and were imposed in violation of criminal contempt procedures. These sanctions include: (1) a \$150,000 fine to be paid into the fund (Pet. App. A115, A156); (2) additional assessments to finance the fund (*id.* at A115); (3) a requirement of computerized record keeping (*id.* at A126); and (4) attorney's fees and expenses (*id.* at A126, A156-A157).⁹

Criminal contempt sanctions are punitive in nature and are imposed to vindicate the authority of the court. Civil contempt sanctions, on the other hand, may be used for either or both of two purposes: to coerce the defendant to comply with the court's order and to compensate the complainant for losses suffered. *Skillitani v. United States*, 384 U.S. 364, 368-370 (1966); *United States v. United Mine Workers*, 330 U.S. 258, 302-304 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911).

Although it is not always easy to determine whether a particular order constitutes a civil or criminal contempt sanction (*McCrone v. United States*, 307 U.S. 61, 64 (1939)), no such difficulty is presented here. The contempt sanctions imposed in this case were clearly coercive or compensatory in nature, not punitive.

⁹ As noted below (pages 24-26, *infra*), the AAAPPO, which contains the 29.23% nonwhite membership "goals," may rest to some degree upon the district court's civil contempt power, as well as its Title VII authority. It is clear, however, that the AAAPPO was not entered purely as a contempt sanction, and thus we do not consider whether its provisions could be sustained on that basis alone.

As the court of appeals recognized (Pet. App. A26), the sanctions relating to the fund—the initial \$150,000 assessment and the continuing levies against petitioners—were clearly designed to coerce compliance with the 29.23% nonwhite membership "goal." The fund is to continue until this "goal" is met, and at that time petitioners are entitled, with the court's consent, to recover what is left (*id.* at A114-A116). Thus these sanctions are similar to the classic civil contempt sanctions of a periodic fine to be assessed against the contemnor until the underlying court order is obeyed. The coercive nature of the monetary sanctions in this case is not changed by the fact that they sought in part to coerce compliance with what we shall argue (pages 24-36, *infra*) is an invalid "goal."

The remaining sanctions are also of the type allowed for civil contempt. The requirement of computerized recordkeeping coerces compliance with prior, more general recordkeeping orders. The assessment of attorney fees and expenses compensates the other parties for costs occasioned by petitioners' contempt. See *Hutto v. Finney*, 437 U.S. 678, 687 (1978).¹⁰

B. The Evidence Supports the Contempt Findings

Petitioners also contest the evidentiary basis for their contempt citations. Specifically, they contend

¹⁰ The non-punitive nature of the sanctions imposed is consistent with the character and purpose of the proceedings in the district court. The proceedings were initiated to secure compliance with the court's orders, were denominated civil contempt proceedings, and were considered to be such by all concerned (*e.g.*, Pet. App. A126, A150, A444-A445). The relief requested was civil in nature (*id.* at A142, A444-A445, A476). Petitioners were on notice that fines were being sought (*id.* at A444, A476) and made no effort to seek a Rule 42(b) hearing.

that the district court "misused" statistical evidence in its 1975 finding that they had violated Title VII—the finding that supports the remedial orders that they were subsequently found to have violated. They also contend that the district court's improper use of statistical evidence concerning their alleged "underutilization" of the apprenticeship program requires that the 1982 contempt finding be set aside (Pet. 18-19). These contentions lack merit.

1. The 1975 Liability Finding

Petitioners' challenge to the district court's 1975 finding that they had discriminated against minorities in violation of Title VII is not properly before the Court. This finding was made a decade ago and was twice affirmed by the court of appeals—in 1976 (Pet. App. A211-A215) and again in 1977 (*id.* at A169 n.8). On the latter occasion, Judge Meskill registered a strenuous dissent containing the same contentions now advanced by petitioners (*id.* at A169-A181). Petitioners, however, did not seek certiorari from this Court to review either of these judgments of the court of appeals.¹¹ Those decisions, as petitioners acknowledge (Reply Memo 7-8), are therefore the law of the case (see page 25, note 24, *infra*), and petitioners have not provided any reason why the findings affirmed in those decisions should now be reviewed by this Court.¹²

¹¹ In both cases, the court of appeals was reviewing a final judgment, not an interlocutory order. Thus, petitioners had no ground for deferring their challenge to the findings.

¹² Petitioners' attack on these findings is not based on any intervening change in the law. Their attack on these findings (see Pet. 18) is based upon *Hazelwood School District v. United States*, 433 U.S. 299 (1977), which antedated and was

Petitioners' contention (Pet. 12 n.7) that "[a] contempt proceeding requires consideration of the legality of the underlying order" is inconsistent with the settled rule that outstanding federal court injunctions must be obeyed until modified or reversed. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439 (1976); *Walker v. City of Birmingham*, 388 U.S. 307, 313-314 (1967); *United States v. United Mine Workers*, 330 U.S. at 293-294; *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922). As the Court observed in *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948), "[i]t would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." See also *United States v. Rylander*, 460 U.S. 752, 756-757 (1983); *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628, 637 (3d Cir. 1982) (en banc), cert. denied, 465 U.S. 1038 (1984).¹³

Even if the question were properly before the Court, there is no basis on this record for setting aside the concurrent findings of the courts below that

discussed in the Second Circuit's 1977 decision (see Pet. App. A168; *id.* at A169-A180 (Meskill, J., dissenting)). Compare footnote 24, *infra*).

¹³ Moreover, petitioners failed to raise the validity of the 1975 liability finding in the court below as a basis for overturning the contempt citations, and the court of appeals accordingly did not address the question. This Court will address issues not raised below only in exceptional circumstances. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn v. United States*, 355 U.S. 339, 362-363 n.16 (1958). No such circumstances are present here.

petitioners violated Title VII. Cf. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Petitioners contend that the 1975 liability finding is inconsistent with this Court's subsequent decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), because it is based upon events that predated the 1964 Civil Rights Act and because the proof of a pattern or practice of discrimination by statistical evidence was not "logically consistent [and] drawn from relevant geographical locations" (Pet. 18). As the court of appeals stated in its 1977 decision in this case, however, the finding of liability under Title VII "did not rely on inferences from racial ratios of population and employment in the area to establish a prima facie case of discrimination," but rather "was based on direct and overwhelming evidence of purposeful racial discrimination over a period of many years" (Pet. App. A169 n.8).¹⁴ Indeed, in its original opinion in the case, the court of appeals commented that petitioners' brief "[did] not even make a serious effort to contest the finding of Title VII violations" (*id.* at A215). On this record, there is no basis for disturbing the decade-old finding of Title VII liability.

¹⁴ The court of appeals noted in that opinion, for example, that the petitioners, after the effective date of Title VII, had administered discriminatory entrance examinations for the apprenticeship program; paid for cram courses for sons and nephews of members that were unavailable to minority applicants; refused to accept blowpipe workers for membership because they were predominantly minorities; consistently discriminated in favor of white applicants for transfer from sister construction unions while denying transfer to blacks with equivalent qualifications; and issued temporary work permits to white members of distant, allied construction unions, while denying them to minority group sheet metal workers residing in the New York City area (Pet. App. A169 n.8; see also *id.* at A211-A215, A330-A350).

2. The 1982 Contempt Citation

Nor is there any cause for this Court to set aside the 1982 contempt citation. As affirmed by the court of appeals, this citation was based on four findings: (1) that petitioners adopted a "policy of underutilizing the apprenticeship program to the detriment of nonwhites"; (2) that petitioners "refus[ed] to conduct the general publicity campaign ordered as part of the recruitment program in RAAPO"; (3) that petitioners issued "unauthorized work permits to white workers from sister locals"; and (4) that petitioners failed "to maintain and submit the records and reports required by" prior court orders (Pet. App. A9).¹⁵ The only sanction imposed for this contempt was a \$150,000 fine to be placed in the apprenticeship fund (Pet. App. A156).

Petitioners now challenge only the first of these findings—underutilization of the apprenticeship program. The court of appeals recognized (Pet. App. A16) that Judge Werker's finding of underutilization was based on a statistical misunderstanding.¹⁶ However, the panel majority on the court of appeals found other statistical support in the record to support Judge Werker's conclusion. The panel majority relied

¹⁵ A fifth finding, concerning the older workers program, was overturned on appeal (Pet. App. A18; see page 6, *supra*).

¹⁶ In seeking to compare the number of apprentices admitted to the apprenticeship program between 1971 and 1975 with the number admitted between 1976 and 1981, the district court mistakenly compared the total number of apprentices in the program between 1971 and 1975 (2164) with the number of new apprentices admitted to the program during the period 1976 to 1981 (334) (Pet. App. A16, A151). The record indicates that at least 750 apprentices were participating in the program during this latter period (*id.* at A484-A485).

on the increase in the ratio of journeymen to apprentices employed between 1975 and 1981, the average number of hours worked annually by journeymen during this same period, and the change in apprentice unemployment between 1977 and 1981 (Pet. App. A16).¹⁷ In dissent, Judge Winter concluded that the statistics in the record did not show underutilization of the apprenticeship program. He relied on enrollment in the apprenticeship program between 1977 and 1981 (Pet. App. A44 & n.5), the decrease in the number of journeymen between 1975 and 1981 (*id.* at A46), the average number of 40-hour weeks worked by journeymen between 1970 and 1980 (*ibid.*), and the percentage of total hours worked by journeyman and apprentices between 1977 and 1981 (*id.* at A47).¹⁸

We see no need or reason for resolving this murky statistical dispute in this Court. Since petitioners do not challenge three of the findings on which the 1982 contempt citation was based, we see no reason why this citation, as well as the only sanction imposed for this contempt—the \$150,000 fine—cannot stand independent of the finding of underutilization. It should be noted, however, that the fine in any event may be reexamined on remand because it is closely tied up with the racially exclusionary fund, which must be

¹⁷ In addition to these statistics, the panel majority relied on petitioners' failure to conduct the publicity campaign and the issuance of temporary work permits to predominantly white journeymen (Pet. App. A16).

¹⁸ Judge Winter also relied on the administrator's close supervision of the apprenticeship program and the "excruciating reduction in the demand" for Local 28's services (Pet. App. A47).

substantially modified for reasons explained below (see pages 36-39, *infra*).¹⁹

II. THE QUESTIONS WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN ESTABLISHING THE OFFICE OF ADMINISTRATOR IN 1975 AND CONTINUING THAT OFFICE IN 1983 ARE NOT PROPERLY BEFORE THE COURT

Petitioners contest (Pet. 19-20) the district court's appointment in 1975 of an administrator with broad powers over their activities, as well as those provisions of the 1983 AAPO continuing his term of office. They claim that the office of administrator unjustifiably interferes with their right to self-government.

Petitioners, however, have waited a decade since the administrator was appointed and nine years since his appointment was sustained by the court of appeals to take this claim to this Court. If petitioners were dissatisfied with the court of appeals' 1976 affirmance of the district court's appointment of the administrator, they should have sought review by this Court at that time. The court of appeals' decision is the law of case, and petitioners have provided no reason why that law should not be followed. In any event, because of the complexity of the case, the possibility

¹⁹ The petition does not challenge the evidentiary basis of the 1983 contempt finding. Thus the validity of that determination is not properly before the Court. See Sup. Ct. R. 21.1 (a); *Berkemer v. McCarty*, No. 83-710 (July 2, 1984), slip op. 22 n.38. In any event, the concurrent findings of the courts below amply support the ruling that petitioners violated the RAPO by failing to provide required records in a timely fashion, failing to provide accurate data, and failing to serve the O&J and RAPO on contractors. See Pet. App. A20-A22, A126, A128-A138.

of hearings for back pay awards (Pet. App. A307), and petitioners' established record of resistance to prior state and federal court orders designed to ensure nondiscriminatory membership procedures (see Pet. App. A211, A214, A220, A352), appointment of an administrator was within the district court's discretion. See Fed. R. Civ. P. 53; *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir.), cert. denied, 464 U.S. 915 (1983); *Ruiz v. Estelle*, 679 F.2d 1115, 1160-1163 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983); *Gary W. v. Louisiana*, 601 F.2d 240, 244-245 (5th Cir. 1979).

The question whether the district court abused its discretion in 1983 in continuing the office of administrator is also not properly before the Court. Although petitioners appealed from this order, they did not contend in the court of appeals that the office of administrator should be discontinued. Rather, they argued only that the provisions of the AAAPPO relating to the administrator "should be modified to limit his authority to adjudicating disputes under AAAPPO and for no other purpose."²⁰ Petitioners thus did not argue below that the administrator's office should be discontinued, and the court of appeals did not address the point. This Court should therefore decline to consider it. *Brandon v. Holt*, No. 83-1622 (Jan. 21, 1985), slip op. 9 n.25; *Monsanto Co. v. Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984), slip op. 5-6 n.6. In any event, petitioners' repeated violations of RAAPPO, which resulted in contempt findings, make it clear that the district court did not abuse its discretion in entering its 1983 order continuing the office of administrator to ensure compliance with its decrees.

²⁰ See petitioners' brief (at 92) as appellant in the court of appeals.

Although the court of appeals' initial hope that the administrator's appointment would prove to be temporary (Pet. App. A220) has unfortunately not been realized, his extended term of office is attributable to petitioners' failure to comply with the district court's remedial decrees.²¹ The courts below properly recognized the general rule that appointment of a special master is "an extraordinary remedy" (*United States v. City of Parma*, 661 F.2d 562, 578-579 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982)) to be used only where less intrusive means appear inadequate to ensure compliance with the court's decree (see Pet. App. A220, A352, A354-A356). Assuming arguendo that the issue is properly before the Court, no basis exists on this record for terminating the administrator or limiting his powers at this time.

III. THE 29.23% MEMBERSHIP QUOTA AND THE FUND ORDER ARE INVALID

As we have explained, petitioners were properly held in contempt. In addition, much of the relief ordered by the district court was proper. However, the orders at issue in this case contain several provisions that extend benefits to individuals solely on the basis of race and not because they are the actual victims of discrimination. Petitioners have been ordered to achieve a finely calibrated nonwhite membership "goal"—29.23% by August 31, 1987. This goal is in reality a quota because petitioners "must" reach the specified nonwhite membership percentage or "face fines that will threaten [petitioners'] very existence"

²¹ As indicated (page 17, *supra*), injunctive orders, whether or not correct, must be complied with until vacated or reversed.

(Pet. App. A123).²² Disregarding the impact on white members and applicants for membership, the order requires that racially preferential treatment be employed to achieve the quota. Nondiscrimination is neither the end nor the means of this order. Instead, the order requires a racial ratio through racially discriminatory means. This technique is carried over into the order requiring petitioners to make large payments into a training and education fund reserved exclusively for nonwhites. These two portions of the orders below are improper.

A. The Membership "Goal"

As we stated in our response to the petition (at 10), it is not clear whether the critical 29.23% non-white membership "goal" rests exclusively upon the district court's Title VII remedial authority or whether the district court also intended to invoke its power to impose sanctions for civil contempt. According to the court of appeals (Pet. App. A28), the AAAPPO, which contains this "goal," was a response both to "Local 28's failure to meet the 29% nonwhite

²² See also Pet. App. A54, A220, A232, A305. The court of appeals' characterization of the order as a "goal" rather than a "permanent quota" does not suggest that it viewed the "goal" as anything other than an inflexible, mandatory requirement for achieving the specified nonwhite percentage by 1987. Rather, the court described the order as a "goal" because, relying on the distinction set forth in *Rios v. Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (3d Cir. 1974), it believed that the "quota" label applied only to those rigid mandatory racial percentages that are required to be permanently maintained, not simply achieved by a particular time. See 501 F.2d at 628 n.3. Utilizing conventional terminology, we characterize any mandatory requirement for a fixed racial percentage as a quota, regardless of whether this percentage must be maintained in perpetuity.

membership goal by July 1, 1982" and "Local 28's contemptuous refusal to comply with many provisions of RAAPO."²³ This seems to suggest that the 29.23% "goal" was imposed in part as an exercise of the district court's contempt power.

On the other hand, as petitioners point out (Pet. 13), the court of appeals tested this provision solely against Title VII and Fourteenth Amendment standards (Pet. App. A27-A33). And although the court of appeals addressed the issue of contempt remedies in another portion of its opinion (*id.* at A25-A27), it did not apply this analysis to the AAAPPO or its 29.23% "goal." Furthermore, this quota appears to represent nothing more than the reimposition, with a slight statistical adjustment (see page 5, *supra*), of the 29% "goal" embodied in the O&J and RAAPO, neither of which rested on the district court's power of contempt. Indeed, respondents the City and State of New York have taken the position (Br. in Opp. 13 n.*) that the 29.23% "goal" is "in reality" the same as the prior 29% "goal"—from which it must follow that the 29.23% "goal" rests exclusively on Title VII. Although we remain uncertain about the intended basis for the 29.23% "goal," if forced to speculate about the district court's intent (and that is the best that can be done without a remand), we would tend to agree with the City and State that the 29.23% "goal" rests exclusively upon Title VII.²⁴

²³ In addition, the statistical adjustment from a goal of 29% to a goal of 29.23% responded to the merger of several other locals and their JAC's with petitioners in this case. See Pet. App. A9.

²⁴ Although we agree with the state and city that the 29.23% "goal" represents the reimposition of the previous 29% goal with a slight statistical modification, we disagree

But whichever ground the district court chose, the 29.23% "goal" cannot be sustained.

1. If the "goal" was imposed as a Title VII remedy, it exceeded the scope of the district court's remedial authority under Section 706(g). As we show in our brief as amicus curiae in *Local No. 93, International Association of Firefighters v. City of Cleveland*, cert. granted, No. 84-1999 (Oct. 7, 1985), Section 706(g) of Title VI, as interpreted by this Court in *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206 (June 12, 1984), prohibits quota relief such as that awarded here.²⁵ The court of appeals in the present case rejected petitioners' contention

with their contention (Br. in Opp. 12-16) that petitioners are barred from contesting the new "goal." Because the prior decisions concerning the 29% goal were rendered during earlier stages of this same case, they are the law of the case, not res judicata. See *Arizona v. California*, 460 U.S. 605, 618 (1983); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404 (2d ed. 1984). "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. at 618. Here, this doctrine does not preclude petitioners' challenge to the 29.23% "goal." First, this Court's subsequent decision in *Stotts*, which greatly clarified the permissible scope of Title VII remedies, represents an intervening legal development sufficient to justify reexamination of the propriety of the prior relief. See 1B J. Moore, J. Lucas & T. Currier, *supra*, ¶ 0.404[1], at 123-124. Moreover, subsequent orders in the case have drastically increased the penalty for failure to achieve the nonwhite membership "goal" and have accordingly made it abundantly clear that this figure is not a hortatory goal to be achieved by non-discriminatory means but a rigid, minutely calibrated quota to be met on pain of "fines that will threaten [petitioners'] very existence" (Pet. App. A123).

²⁵ We are serving copies of our brief in *Local No. 93* upon the parties in this case.

that "*Stotts* eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination" (Pet. App. A29). However, the court of appeals' three bases for distinguishing *Stotts* (see page 7, *supra*) cannot withstand scrutiny.

First, the court of appeals was clearly wrong in concluding (Pet. App. A30) that *Stotts*' holding is limited to cases in which the remedial orders infringe upon seniority rights. Our brief in *Local No. 93* addresses this question (at 17-18), and we rely upon that discussion here.

The court of appeals also erred in holding that *Stotts* does not apply to "prospective," class-based relief as opposed to retrospective, make-whole relief. The court of appeals did not explain what it meant by prospective relief; nor did the court explain why it discerned this distinction in *Stotts*. In our view, this distinction is not rational and cannot be reconciled with the language of Section 706(g), the legislative history of Title VII, or the decision in *Stotts*.

The final sentence of Section 706(g), which enforces the remedial principle of victim-specificity, expressly refers, not only to forms of retrospective relief such as back pay and retroactive seniority, but to what must be regarded as forms of "prospective" relief, namely, "admission * * * as a member of a union," "hiring," and "promotion." Indeed, one of these forms of relief—admission to union membership—is precisely the objective of the 29.23% membership quota at issue in this case. Further, as this Court's discussion of the legislative history in *Stotts* makes clear, members of Congress who explained the meaning of Section 706(g) repeatedly referred to admission to union membership as a form of relief

governed by that provision.²⁶ Thus, we do not understand how it can be argued that Section 706(g) does not govern prospective relief in general or union membership quotas in particular.

The decision in *Stotts* likewise leaves no room for a distinction between prospective and retrospective relief.²⁷ The remedy at issue in *Stotts* was an injunction prohibiting the city from following its seniority system in making lay-offs insofar as that system would decrease the percentage of black employees. This injunction operated prospectively, just like the membership "goal" and fund order in this case.²⁸

²⁶ See *Stotts*, slip op. 17 (quoting remarks of Sen. Humphrey at 110 Cong. Rec. 6549 (1964); slip op. 18 (quoting the Clark-Case interpretive memorandum at 110 Cong. Rec. 7214 (1964), the bipartisan newsletter at 110 Cong. Rec. 14465 (1964), and Republican memorandum at 110 Cong. Rec. 6566 (1964)).

²⁷ This is purely a Title VII case. No violation of any other federal statute or constitutional provision was alleged or found. See Pet. App. A318.

²⁸ *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), also held that Section 706(g) reaches prospective equitable relief such as that at issue here. In that case, the district court, after finding that the defendant employer had engaged in a practice of discriminating against blacks in its hiring of over-the-road truck (OTR) drivers, ordered that each member of a class of rejected black applicants be given preference in hiring to fill future vacancies (i.e., prospective relief). At the same time, the district court refused to award back pay and seniority (i.e., retrospective relief). This Court, in holding that back pay and seniority should be available for the actual victims of the employer's discrimination, explained that the employer was entitled on remand "to prove that a given individual member of [the] class * * * was not in fact discriminatorily refused employment as an OTR driver in order to defeat the individual's claim to seniority relief as well as any remedy ordered for the class generally" (424 U.S. at 773 n.32 (emphasis added)).

Accordingly, *Stotts* itself struck down precisely the type of prospective, race-conscious relief that the court below approved. Indeed, it was precisely on the ground that the injunction in *Stotts* represented "race-conscious class relief," rather than "'make-whole' relief," that the dissenting Justices in that case would have upheld the injunction (see dissenting slip op. 20-21).

Finally, it would be irrational to apply fundamentally different remedial principles to prospective and retrospective relief. Whether a particular case calls for prospective or retrospective relief usually depends upon whether the discriminatory practice is challenged in court after it has caused harm or when the harm is ongoing. It would not make sense to apply a different remedial principle based upon this happenstance. Indeed, such a rule would have the perverse result of affording *greater* remedial benefits to persons who have never been affected by an employer's discrimination than to actual victims. Under the court of appeals' reasoning, nondiscriminatees could be preferentially granted any employment benefit provided in a "prospective" class-based injunction, but relief for the actual victims of discrimination would be limited to those benefits that were actually denied by prior discrimination and thus were necessary to make the victims whole.

The third ground advanced by the court of appeals for distinguishing *Stotts*—that there was no finding of any intent to discriminate in *Stotts* (Pet. App. A30-A31)—is plainly beside the point. Section 706(g) broadly governs *all* relief entered in Title VII cases. Nothing in Title VII or in *Stotts* or in any other decision of this Court even remotely suggests that the remedial power of a Title VII court differs

depending upon whether the discrimination is intentional.

2. While Section 706(g) contains the important remedial limitation noted above, we wish to emphasize that Section 706(g) gives courts very broad remedial powers. That section authorizes courts not only to enjoin unlawful practices, but also to "order such affirmative action as may be appropriate," including reinstatement or hiring of victims of discrimination with or without back pay," "or any other equitable relief as the court deems appropriate." The final sentence of Section 706(g) precludes a court only from awarding relief such as employment, union membership, or other preferences to non-victims on the basis of race, sex, national origin, or religion. It does not otherwise limit a court's "broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of [Title VII] eliminate their discriminatory practices and the effects therefrom" (*Teamsters v. United States*, 431 U.S. 324, 361 n.47 (1977)). Affirmative action that corrects and prevents discriminatory practices without itself requiring discrimination is entirely consistent with the language and policy of Section 706(g).

Many aspects of the remedial orders in this case exemplify proper affirmative relief. These include the appointment of an administrator to oversee petitioners' admission and apprenticeship practices; publicity campaigns designed to increase the number of non-white applicants; the reporting and record keeping requirements; and the requirement that petitioners fully utilize the apprenticeship program so as not to evade the mandate to end their massive resistance to Title VII.

We believe that those who violate Title VII should be made to take specific, affirmative steps to correct their discriminatory practices and ensure equal opportunity in the future. An effective remedial order can and should spell out the specific actions that a union or employer must undertake to reform identified discriminatory practices. It should provide for close monitoring of the future practices of those found to have been "proved wrongdoers" under Title VII, until the court is satisfied that meaningful and permanent changes have been made. See *Teamsters*, 431 U.S. at 361 (an award of prospective relief "might take the form of an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights' protected by Title VII").

For example, if an employer has discriminated by deliberately targeting its recruiting efforts at predominantly white residential areas of a city, then the remedy appropriately may include requiring the employer to expand its recruitment efforts city-wide in order to reach predominantly minority communities. If an employer intentionally avoids referral sources that provide substantial numbers of minority or female applicants, the remedy should include requiring the employer to seek applicants from these sources as well. If discrimination takes the form of arbitrary barriers to promotion or equal access to jobs, the remedial order should eliminate the barriers and provide means to overcome their continuing effects, such as by enhanced training open to all, changes in job requirements that serve no legitimate business purpose, and additional recruitment.

There are many other examples of nondiscriminatory types of affirmative action that fully comport with the remedial policy of Section 706(g).²⁹ When imposed by a court as equitable remedies, they must, of course, be tailored in scope "to fit 'the nature and extent of the * * * violation.'" *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976), quoting *Milliken v. Bradley*, 418 U.S. 717, 744 (1974). And they may lawfully be ordered by a court so long as they do not violate the policy behind Section 706(g) "to provide make-whole relief only to those who have been actual victims of illegal discrimination." *Stotts*, slip op. 16-17.

The prohibition of racially preferential relief is an important and necessary policy that accords with the statute's fundamental principle of non-discrimination. It does not in any way diminish a court's ability to provide full corrective and preventive remedies for discrimination. The statutory goal of non-discrimination can only be achieved by requiring full make-whole relief for victims of discrimination, coupled with the elimination of all discriminatory practices to cure the effects of discrimination and detailed monitoring of compliance.

²⁹ These may include provisions requiring that qualified individuals carry out the employer's or union's equal employment opportunity program, that sufficient resources be devoted to that program; that disciplinary action be taken against officials or employees guilty of discrimination; that the employer's or union's policy of equal employment opportunity be publicized; that the employer or union participate in community efforts to combat discrimination; and that the employer or union establish a procedure for counseling individuals who believe that they have been subjected to discrimination and for promptly, fairly, and impartially considering and disposing of complaints of discrimination.

3. Even if the district court imposed the membership quota in the exercise of its contempt power, the quota still cannot be sustained because it is contrary to the strong remedial policy of Title VII. In *Stotts* (slip op. 16-17), this Court noted that the remedial policy of Title VII "is to provide make-whole relief only to those who have been actual victims of illegal discrimination." As we have argued in our brief in *Local No. 93* (at 6-18), a quota necessarily violates this policy because it awards benefits and inflicts disadvantages that are not linked to any past discrimination but are based instead solely on factors such as race and ethnicity.

Federal courts, in our view, must also respect this strong statutory policy in framing sanctions for civil contempt. But we wish to emphasize at the outset that this policy does not diminish a court's ability to compel compliance with a Title VII decree. Title XI of the Civil Rights Act of 1964 recognizes a court's inherent power "by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of * * * any lawful * * * order * * * of the court in accordance with the prevailing usages of law and equity, *including the power of detention*." 42 U.S.C. 2000h (emphasis added). It further authorizes criminal contempt sanctions, subject to the right to a jury trial. As Congress made clear in enacting Title XI, courts need not countenance repeated attempts by proven discriminators to avoid compliance with Title VII decrees.

In this case, these powers should be vigorously exercised in response to petitioners' contemptuous conduct. As we have discussed, the district court's contempt citations followed the proper procedures for civil contempt and rest on sound evidentiary find-

ings that petitioners are continuing to ignore specific court-imposed requirements. Moreover, the 1982 and 1983 contempt citations are only the latest chapter in petitioners' history of non-compliance with Title VII. The original finding of liability in 1975 was "based on direct and overwhelming evidence of purposeful racial discrimination over a period of many years" (Pet. App. A169 n.8). And both before and after this finding petitioners continued to build a record of resistance to other state and federal court orders designed to ensure non-discriminatory membership procedures. Pet. App. A211, A215, A352.

But the very egregiousness of petitioners' violations is no justification for the court's resort to contempt remedies that themselves contravene the statute's policy by imposing a racial quota or other racial preference. Rather, Title XI underscores the court's power to compel compliance through other and far more stringent measures, including coercive fines and detention, when disobedience to a court's order is as blatant as petitioners' conduct has been found to be. In light of these vast powers of contempt, it is all the more critical that a court in seeking to bring about compliance with a Title VII decree must not lose sight of the underlying policies of the statute that it is trying to enforce. Contempt sanctions imposed to enforce Title VII must not themselves violate the statute's policy of prohibiting unions from discriminating on the basis of race and of providing make-whole relief only to actual victims of discrimination.

Setting a 29.23% membership quota is impermissible because it confers union membership and other benefits on the basis of race to persons who are not the victims of discrimination. It necessarily will re-

sult in discrimination against those white persons who wish to enter the union or the sheet metal trade but will be kept out solely because of their race. Because these persons are not members of the union, they plainly are not responsible for the union's past conduct. Yet those who *are* responsible—most notably the union's leaders—will escape any penalty. We agree with the lower courts in this case that disobedience of Title VII judgments should not be tolerated, that petitioners have accumulated an ample record of inexcusable disobedience, and that this conduct calls for the strongest possible measures to bring about complete, and long overdue, compliance with Title VII. But the force of those contempt sanctions should be felt by the individuals responsible for disobeying the court's order, not by third parties who bear no part of the culpability. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 441-442. Contempt sanctions should be strong—but not indiscriminate.

The imposition of racial or ethnic quotas as contempt sanctions would also transgress constitutional principles. See Pet. App. A48 (Winter, J., dissenting). For the reasons set out in our brief as amicus curiae (at 9-30) in *Wygant v. Jackson Board of Education*, cert. granted, No. 84-1340 (Apr. 15, 1985), and in our petition for a writ of certiorari (at 21-25), in *Orr v. Turner*, No. 85-177, the membership quota at issue here contravenes the equal protection component of the Due Process Clause of the Fifth Amendment.³⁰ The constitutional question, however, need not be addressed unless the Court determines that Congress intended to authorize the courts to award such relief.

³⁰ We are serving copies of our *Wygant* brief and *Orr* petition on the parties in this case.

Finally, even if racial quotas were permissible contempt remedies in Title VII cases, the facts of this case do not justify imposition of such sanctions. In setting aside the 1:1 indenture ratio, the court of appeals observed that petitioners "have voluntarily indentured 45% nonwhites in the apprenticeship classes since January 1981, and there is no indication that [they] will in the future deviate from this established, voluntary practice" (Pet. App. A37). Moreover, the selection board appointed by the district court will be able to review the selection process to ensure that nondiscriminatory practices are followed (*ibid.*; *id.* at A57-A58). In these circumstances, imposition of a 29.23% membership quota as a contempt sanction was unnecessary and entirely without justification.

B. The Fund Order

For similar reasons, the racially exclusionary feature of the fund order is also invalid. The fund, which consists primarily of the contempt fines levied against petitioners, is intended to "compensate nonwhites, not with a money award, but by improving the route they most frequently travel in seeking union membership" (Pet. App. A26). It is to be used *exclusively* for the benefit of nonwhites (*id.* at A114), and there is no requirement that the fund's beneficiaries be actual victims of petitioners' past discrimination. Among other things, the fund is to be used for establishing a tutorial program of up to 20 weeks' duration for nonwhite first-year apprentices; creating part-time and summer sheet metal jobs for nonwhite youths between the ages of 16 and 19 who have completed or are enrolled in specified types of training programs; paying the expenses of nonwhite members and apprentices who act as "liaisons" to vocational and tech-

nical schools having sheet metal programs; appointing counselors to help ensure that nonwhite apprentices complete the program; providing stipends to unemployed nonwhite apprentices while they attend their regular apprenticeship class and any additional classes offered to nonwhites pursuant to the AAAPPO; and establishing a low-interest loan fund for nonwhite first-term apprentices (Pet. App. A116-A117). White apprentices are totally barred from all of these programs.

Insofar as the fund order creates part-time and summer jobs for nonwhite youths only, it is inconsistent with the express terms of Section 706(g), which prohibits a court from ordering "the hiring * * * of an individual as an employee" unless that individual was discriminatorily refused employment by the employer. Section 706(g) does not expressly address the other racially-exclusive benefits conferred by the fund order (*i.e.*, the tutorial, liaison, counseling, stipend, and loan programs), but those aspects of the order are equally offensive to the remedial policy of Title VII. In any event, these programs are plainly unlawful under Section 703(d) of Title VII, 42 U.S.C. 2000e-2(d), which prohibits racial discrimination in apprenticeship programs. The district court has in effect ordered a 100% racial quota for these programs. Since whites are totally excluded from the programs, the fund order in this regard fails to satisfy even the standards for voluntary affirmative action plans of private employers established by the Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979), which requires that such plans must not "unnecessarily trammel the interests of white employees."³¹

³¹ A judicial order creating such a race-conscious fund also violates equal protection. See page 35, *supra*.

Because, as we have shown, an employment and training fund solely for the benefit of minorities is contrary to the remedial policy of Title VII, neither is it a proper contempt sanction in a Title VII case. This does not mean, however, that the concept of the training fund was unsound. On the contrary, a training fund and many of the accompanying measures devised by the district court—recruitment of nonwhite apprentices, publicity regarding petitioners' court-enforced commitment to end discrimination, and financial measures to assist apprentices—were appropriate and constructive Title VII remedies. Indeed, the only objectionable feature of the fund and its programs is their restriction to nonwhites. A training fund, financed by assessments against petitioners and administered on a nondiscriminatory basis, would be a proper and effective way of remedying petitioners' violation of Title VII. The publicity campaign and enhanced recruitment of nonwhite apprentices should ensure that nonwhites apply for the apprenticeship program. The apprenticeship selection board should guarantee that the selection of apprentices does not discriminatorily favor whites. (As noted, in recent years apprenticeship classes have been 45% nonwhite.) Finally, the supervision of the administrator and the court should ensure that the programs are operated in a nondiscriminatory way. Restricting participation in the fund's programs to nonwhites (or the enforcement of a racial quota) is not needed to end petitioners' discrimination; such measures will only visit fresh wrongs on innocent persons seeking to enter the sheet metal trade.

The district court, however, directed the establishment of a fund to be used exclusively for the benefit of nonwhites. The finding that the apprenticeship program was underutilized, to the detriment of both

whites and nonwhites desiring to enter the program, simply does not justify creating an apprenticeship fund for the exclusive use of nonwhites.

The fund order is invalid for an additional reason. Under the district court's order, the fund is to remain in existence until the 29.23% goal is met (Pet. App. A114), and until that time petitioners must make periodic payments to finance its operations (*id.* at. A115). Thus, as the court of appeals recognized (*id.* at A26), the fund is in part a measure designed to coerce compliance with the 29.23% "goal". Since that "goal" is invalid, the fund order insofar as it is designed to enforce the "goal" must be set aside as well.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part and the case remanded for the entry of appropriate relief.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CAROLYN B. KUHL
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MICHAEL CARVIN
DENNIS J. DIMSEY
Attorneys

JOHNNY J. BUTLER
Acting General Counsel
Equal Employment Opportunity Commission

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RESPONDENT'S BRIEF

NO. 84-1656

Supreme Court, U.S.

F I L E D

JAN 35 1986

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION AND LOCAL 28 JOINT APPRENTICESHIP COM-
MITTEE,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CITY
OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN
RIGHTS,

Respondents.

**On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit**

BRIEF FOR RESPONDENT THE CITY OF NEW YORK

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the City of New York,
*Attorney for Respondent the City of New
York,*
100 Church Street,
New York, New York 10007,
(212) 566-4328 or 4338

LEONARD KOERNER,
STEPHEN J. McGRATH,
LORNA B. GOODMAN,
LIN B. SABERSKI,
of Counsel.

Questions Presented

1. Whether as a remedy in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or as a civil contempt remedy for violations of a Title VII judgment, a court may award race-conscious relief not limited to benefitting proven victims of the prior discrimination, where the proven discrimination was intentional and egregious, compliance with remedial orders has been, at best, grudging, and at worst, totally lacking, and where the effects of the discrimination remain vigorous more than ten years after entry of the District Court's original findings of discrimination.

2. Whether race-conscious remedies violate the equal protectino guarantee of the Due Process Clause of the Fifth Amendment.

3. Whether the proof in this case supported the 1982 contempt findings and the findings of discrimination made in 1975 and sustained on appeal in 1976 and 1977.

4. Whether the contempt remedies imposed in this case were appropriate sanctions for findings of civil contempt.

5. Whether the District Court properly exercised its discretion in appointing an administrator in 1975 to supervise compliance with its orders in this case and in continuing his term of office in 1983.

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NO. 84-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28, OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION AND LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMIS-
SION, THE CITY OF NEW YORK and NEW YORK
STATE DIVISION OF HUMAN RIGHTS,

Respondents.

**On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit**

BRIEF FOR RESPONDENT THE CITY OF NEW YORK

Statement of the Case

For over twenty years respondents the City of New York (the "City") and the New York State Division of Human Rights (the "State") have worked to open membership in Local 28 of the Sheet Metal Workers' International Association ("Local 28" or the "union") to non-whites.* In proceedings before the State Commission for Human Rights, the City Commission on Human Rights, the New York State Supreme Court and the United States District Court, respondents have sought to bring petitioners Local 28 and the Joint Apprenticeship Committee ("JAC") into compliance with City, State and federal laws guaranteeing equal employment opportunity, and to prevent them from obstructing the City's efforts to implement Presidential and Mayoral executive orders which require contractors employed by the City to act affirmatively to open employment opportunities to previously excluded groups. The sorry history of petitioners' consistent and intentional resistance to those efforts is a regrettable testament to the need for the Employment, Training, Education and Recruitment Fund which, *inter alia*, petitioners are seeking to have this Court overturn.

The need for this Fund has been well documented by numerous decisions of the District Court throughout the course of this litigation and reaffirmed by three decisions of the Second Circuit Court of Appeals. Petitioners' attempts to portray themselves as innocent victims suffering under unjustly imposed draconian remedies cannot with-

* The term "non-whites," when used in this brief, refers to black and Spanish sur-named individuals.

stand scrutiny. Indeed the facts supporting the 1975 findings of intentional discrimination and the 1982 and 1983 contempt decisions are virtually undisputed (A 13, 20, 215; JA 210-13, 248-51; Pet. Br. on Merits at i, ii, 35-37).

I. Local 28's History of Intentional Racial Exclusion

The Sheet Metal Workers' International Union (the "International") was formed in the last quarter of the nineteenth century (JA 403, 404).^{*} Until 1946, its Constitution and Ritual provided for the establishment of "white local union(s)" and authorized each of these locals to organize an "auxiliary" local union "subordinate to the ... white local," when there was a "sufficient number of eligible Negro applicants" (A 322).

Local 28 was established in 1913 as the "white local union" representing most sheet metal workers in New York City (A 322).^{**} Since 1913, Local 28 has grown to dominate work in the construction sheet metal trade in New York City (JA 406). The District Court found that Local 28 had "substantial, if not complete control, of job opportunities" among the sheet metal contractors with which it main-

^{*} References to "A" are to the Appendix to petitioners' Petition for Writ of Certiorari. References to "JA" are to the Joint Appendix filed with petitioner's Brief on the Merits.

^{**} Between November 1981 and March 1982, Local 28 merged with five, largely white, sister locals and now represents sheet metal workers in New York City, in Nassau and Suffolk Counties in New York State and in Essex, Passaic, Hudson and Bergen Counties in New Jersey (A 129, 157).

tains collective bargaining agreements (A 324). Local 28 has used its control over opportunities to work in the trade to severely restrict the number of individuals who are authorized to work on jobs that are subject to its contracts (A 346; JA 406), and has sought consistently to favor the sons, relatives and friends of its members whenever it accords new opportunities for membership (A 330; JA 407).^{*} Although the provision of the International's Constitution and Ritual providing for "auxiliary" locals was deleted in 1946, Local 28 steadfastly refused to admit any non-whites until it was forced to do so by court order in November 1964 (A 411; JA 393).

II. Proceedings Before the New York State Commission for Human Rights and the New York State Supreme Court

On January 2, 1963, the New York State Attorney General instituted a proceeding before the State Commission for Human Rights (the "State Commission"), charging Local 28 and the JAC with discrimination against blacks in the designation and approval of applicants for sheet metal apprenticeship and training (JA

^{*} An individual can gain membership in Local 28 via: (1) graduation from the apprenticeship program administered by the JAC; (2) transfer directly from a "sister" union; (3) taking and passing a battery of journeyman level tests administered by the union's Examining Board; and (4) admission at the time a non-union sheet metal shop is organized by Local 28, upon certification by the employer that the shop's workers perform at journeyman standards (A 212). In addition, during periods of full employment within the trade, the union issues temporary "identification slips," or "permits," which entitle non-members to work within the union's jurisdiction. Roughly 90% of Local 28 journeymen enter through the apprenticeship program (A 120).

378, 393). The State Commission's efforts to remedy the unlawful discriminatory practices complained of through informal means were unsuccessful (JA 379).

Following public hearings, the State Commission found that Local 28 and the JAC had "denied to or withheld from qualified Negroes because of their race and color the right to be admitted to or to participate in their sheet metal apprentice training program . . ." (JA 387). Specifically, the State Commission found that admission to the apprenticeship program was left to the "exclusive judgment of Local 28" (JA 406).^{*} Apart from an 18-23 age requirement, apprentices were selected solely on the basis of a personal interview and those applicants who appeared with union sponsorship—largely relatives and friends of union members—were routinely selected (JA 383-84, 386, 406). The State Commission noted that in 1964, at least 80% of all apprentices in the entire apprenticeship training program were relatives of Local 28 members (JA 386), and found that "virtually the only way of gaining admission into Local 28 is through apprenticeship" (JA 407). The State Commission concluded that petitioners' nepotistic admission system operated as an impenetrable barrier for non-whites (JA 407-08).

The State Commission ordered Local 28 and the JAC to "cease and desist" from future discriminatory conduct in violation of the New York Law Against Discrimination (JA 388). The union and the JAC were directed to establish objective written standards and a validated aptitude test for the selection of apprentices and to maintain rec-

^{*} John Mulhearn, Recording Secretary of Local 28, testified: "I take the applications and I appoint the boys, period." See Exhibit Volume to Joint Appendix filed with Second Circuit Court of Appeals on October 10, 1975 at 919.

ords that would permit the State Commission to monitor compliance with its order (JA 388-91).

Subsequently, in June 1964, the State Commission commenced enforcement proceedings against Local 28 and the JAC in New York State Supreme Court (A 412). New York State Supreme Court Justice Markowitz affirmed all of the State Commission's findings and held a series of conferences with the parties to develop a negotiated remedial program "in the hope that the desirable objectives [of the State laws against discrimination] might be achieved by conciliation and agreement rather than by the force of law" (A 414, 415).

Even though the union's nepotistic practices had been identified as a primary source of unlawful discrimination, the union seized upon the conciliation process as an opportunity to gain the Court's approval of its practice of granting preferences to the sons and sons-in-law of union members (A 421). The Court found this preference racially discriminatory and in violation of the New York State Constitution and State law (A 421). Ultimately, with the Court's active participation, the parties developed, and petitioners agreed to be bound by, a "Corrected Fifth Draft of Standards for the Admission of Apprentices" which set forth objective standards for, *inter alia*, apprentice selection, training, admission fees and length of apprenticeship (A 427-40). In addition, the Court secured the agreement of the union to indenture apprentice classes on a regular basis (A 440).

Despite their obligation to indenture apprentice classes on a regular basis, and the parties' agreement that a class of 65 apprentices would be admitted in September, 1965, petitioners unilaterally suspended the processing of applications for that class. *State Commission for Human*

Rights v. Farrell, 47 Misc 2d 244, 245, 262 NYS 2d 526, 527-28 (Sup. Ct. N.Y. Co.), *aff'd*, 24 AD 2d 128, 264 NYS 2d 489 (1st Dep't 1965). The State Commission was forced to bring an enforcement proceeding in the New York State Supreme Court, and the Court ordered Local 28 and the JAC to enter the apprentice class of 65 members by October 30, 1965. *Id.* When the union requested reconsideration of the order, seeking to reduce the class size from 65 to 30, the Court flatly refused and castigated the union for refusing "except for token gestures, to further the integration process. . . ." *State Commission for Human Rights v. Farrell*, 47 Misc 2d 799, 800, 263 NYS 2d 250, 252 (Sup. Ct. N.Y. Co. 1965).

Petitioners' pattern of resistance to integration continued unabated. In 1967, the State Commission again requested a hearing before the New York State Supreme Court upon learning that petitioners were planning to ignore the results of the most recent apprenticeship examination and administer an entirely new test, on the ground that non-whites had received "unfair tutoring" and passed in unreasonably high numbers. *State Commission for Human Rights v. Farrell*, 52 Misc 2d 936, 277 NYS 2d 287 (Sup. Ct. N.Y. Co. 1967). The Court found no evidence of unfair tutoring and ordered petitioners to indenture the apprentices on the basis of the examination results. *State Commission v. Farrell*, 52 Misc 2d at 942-43, 277 NYS 2d at 293-94. The New York Supreme Court's decision was affirmed on appeal by both the Appellate Division and the New York Court of Appeals. *See State Commission for Human Rights v. Farrell*, 27 AD2d 327, 278 NYS 2d 982 (1st Dep't), *aff'd*, 19 NY2d 974, 281 NYS 2d 521, 228 NE2d 691 (1967). Nonetheless, petitioners found a way to circumvent these decisions and the entire thrust of the State Supreme Court's

injunction—they began subsidizing "cram courses" for friends and relatives of union members preparing to take the apprenticeship examination (A 214, 352).

III. The Federal Action

Petitioners' continuing failure to comply with the injunction of the New York State Supreme Court led to the 1971 commencement of this action by the United States Department of Justice (the "Government") pursuant to Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.*, and Presidential Executive Order 11246 (JA 372). The complaint alleged that petitioners had engaged in a pattern and practice of discrimination by failing to recruit non-whites for membership, failing to admit non-whites into the union, refusing to permit Local 28 contractors to fulfill their affirmative action obligations under Executive Order 11246 and "failing and refusing to take reasonable steps to eliminate the effects of their past discriminatory policies and practices" (JA 372-73). The Government requested that the District Court enjoin petitioners' continuing refusal to treat non-whites on the same basis as whites and mandate the "selection of sufficient apprentices from among qualified non-white applicants to overcome the effects of past discrimination" (JA 373-74).

Shortly after the filing of this action, the New York City Commission on Human Rights commenced an administrative proceeding against Local 28 alleging that the union had violated the City Human Rights Law by engaging in racially discriminatory apprenticeship, membership,

and job referral practices (A 393).^{*} On June 2, 1972, the City moved to intervene in the instant action on the basis that, *inter alia*, such intervention was necessary to ensure compliance with the City Human Rights Law and Mayoral Executive Order 20 (A 393). The unopposed motion was granted (A 393).

Following the 1974 strikes and work stoppages which marked petitioners' refusal to accept trainees referred to Local 28 contractors pursuant to Executive Order 11246 and EO 20 (A 326; JA 320, 354-55), the District Court issued several injunctive orders. In an interim order entered on April 9, 1974 and effective through June 30, 1974, the District Court (Gurfein, J.) required the JAC to provide advanced placement in the apprenticeship program for six minority individuals who had been referred as trainees on four City construction sites (JA 366).

This order was superseded by a more comprehensive order entered on July 2, 1974 (JA 363). The July order required that by September 1974 the JAC assign for employment a new class of 60 apprentices which would include 20 minority and 40 non-minority apprentices, and that it process up to 20 applications for advanced placement in the apprenticeship program (JA 363). The JAC undertook only minimal efforts to comply with the District

^{*} The proceeding was based, in part, on the refusal by Local 28 and the JAC to comply with Mayoral Executive Order 20 ("EO 20") (A 326; JA 320, 354). Enacted by Mayor John V. Lindsay in 1970, EO 20 required that contractors on City sites employ one "minority trainee" for every four journeymen employed and was enacted to increase the representation of non-whites in the construction trades in accordance with the dictates of Presidential Executive Orders 11246 and 11375 (JA 354). Local 28 was the only local in the City which refused to comply with EO 20 (A 326; JA 320, 354).

Court's July order and informal efforts by respondents' counsel to secure compliance were unsuccessful (JA 356-58). Only under threat of contempt citations did petitioners eventually comply (A 215; JA 342).

After a three-week trial, Judge Werker concluded that petitioners had engaged in a pattern of intentional discrimination which operated to block non-whites from all routes to admission to membership in Local 28. The Court concluded that the petitioners' recruitment, selection, training and admission practices violated both Title VII and the City Human Rights Law (A 350-51).^{*}

The apprenticeship program is the primary method by which new members gain entrance to Local 28 (A 120, 151, 325; JA 303). Between 1967 and 1973, non-white participation in the apprenticeship program *fell* from 21.8% to 9.8% (A 327).^{**} The Court found that this was the result of utilizing a discriminatory apprenticeship entrance examination (A 338) and unlawfully excluding all apprenticeship applicants who did not possess a high school diploma (A 340). The Court further found that petitioners had discriminated against non-whites by expending union funds to prepare relatives and friends of members for the apprenticeship examination (A 352).

The District Court addressed at length the intentionally discriminatory practices of Local 28 that precluded non-

^{*} As the City details here, even an indulgent reading of Judge Werker's decision on liability could not lead an unbiased reader to conclude, as the petitioners have, that petitioners were found in violation of Title VII, "largely for obeying the... (order of) the State Court." Pet. Br. on Merits at 5.

^{**} It subsequently rose to 13.99% in 1974 as a consequence of judicial intervention (A 327; JA 320, 363).

whites from obtaining direct admission to membership status as journeymen. After observing that qualified non-white sheet metal workers existed in large percentages in other construction locals in New York City, and noting the near total absence of such workers among the membership of Local 28 (A 342-44), the District Court found that Local 28 denied access to qualified non-whites by: (1) failing to administer journeyman examinations and using journeyman examinations which had not been validated pursuant to EEOC Guidelines; (2) selectively organizing non-union sheet metal shops with few, if any, non-white employees, and/or admitting from those shops only white employees; and (3) accepting whites from affiliated sister locals as transfer members while refusing transfers of non-whites. Local 28's refusal to open its ranks to experienced non-union sheet metal workers served, in conjunction with its discrimination in the apprenticeship program, to maintain Local 28 as an almost entirely white union (A 344-51).

Although the sheet metal industry experienced a significant expansion between 1967 and 1972, Local 28 administered only two journeyman entrance examinations during that entire period (A 344-45). This exclusionary practice resulted in a critical shortage of workers which became so severe that the Sheet Metal and Air Conditioning Contractors' Association of New York City ("Contractors' Association") was forced to seek relief by initiating arbitration proceedings against Local 28 (A 344-45). The journeyman tests ultimately administered in 1968 and 1969 were solely the result of arbitration awards mandating that Local 28 admit new members (A 344-45). In addition to finding that the refusal to administer journeyman examinations denied non-whites access to the industry (A 346), the

District Court also found that the 1968 test had an adverse racial impact. All of the 25 candidates who passed were white (A 345).

Although the shortage of workers continued, Local 28 refused to administer a journeyman test in 1970 and instead increased the available manpower by issuing hundreds of "identification slips," or "permits" (A 346).^{*} Between 1968 and 1972 the number of permits issued by Local 28 rose from between 150 and 200 to between 400 and 500, and all but one of the permits were issued to whites, many of whom were members of allied construction unions (A 346). Local 28 conceded that these men did not possess skills equal to those of journeyman sheet metal workers in Local 28, and had not been required to take a test as a prerequisite to working in Local 28 (JA 287-88). The District Court found that although Local 28 requested temporary workers from sister locals throughout the country, it never once contacted the Blowpipe Division of Local Union 400, IASMW, a union of workers with sheet metal skills, which was comprised almost entirely of non-whites (A 346-48). The District Court also found that the president of Local 28 had misled qualified non-whites into believing that they could only work with Local 28 by taking and passing the journeyman test (A 349).

The District Court found that since 1963, in violation of the International's Constitution and Ritual, Local 28 had a policy of accepting transfers only of former members of Local 28 (A 350; JA 284-85). Since the membership of Local 28 was entirely white prior to the time this policy was

^{*} Rather than expand its membership, Local 28 also recalled pensioners to work and, in addition, offered an extraordinary amount of overtime work to its journeyman members (A 346; JA 286, 316-17, 338-39).

instituted, non-whites were automatically excluded from consideration for transfer (A 350). The District Court found that during the period 1967 through 1972, 57 white persons were permitted to transfer into Local 28. No non-whites were allowed to transfer during that period, although a number tried to gain admission (A 349).

No non-whites became members of Local 28 through the organization of non-union shops prior to a 1973 agreement among the parties in this case (A 347). The union's proffered explanation—that it was not aware of non-union shops owned by or employing non-whites and had no policy restricting organizing to white shops—was rejected by the District Court as incredible (A 347). The District Court found that it was common knowledge in the industry that Local 28 avoided organizing non-white shops and, more specifically, that Local 28 refused to organize blowpipe contractors precisely because their members were non-white (A 214, 348).

IV. Early District Court Efforts to Remedy Petitioners' Discriminatory Conduct

In fashioning relief to remedy the multifaceted and clear pattern of intentional discrimination by Local 28 and the JAC, the District Court took note that "[t]he record in both state and federal court against [petitioners] is replete with instances of their bad faith efforts to prevent or delay affirmative action" (A 352). In light of petitioners' failure to take "any meaningful steps to eradicate the effects of [their] past discrimination," (A 352), the District Court concluded that "the imposition of a remedial racial goal in conjunction with an admission preference in favor of non-whites is essential to place [petitioners] in a position of compliance with the 1964 Civil Rights Act" (A 352).

The District Court relied on the 1970 Census conducted by the Department of Commerce for the calculation of the goal (A 353-54; JA 254-74). "[A]fter full consideration of the depressed condition of the construction industry [in 1975], and in the firm belief that a gradual but steady influx of non-whites [would] produce the most stable membership," the District Court ordered that petitioners achieve a combined union and apprenticeship program membership of 29% by July 1, 1981 (A 354 & n.30).

The goal was only one feature of the comprehensive program ordered by Judge Werker to remedy petitioners' discriminatory practices. In his August 1975 Order and Judgment ("O&J"), in addition to enjoining all of the specific recruitment, selection, training and admission practices which he found discriminatory, and imposing the goal, Judge Werker appointed an administrator to work with the parties in developing and implementing a program that would facilitate achievement of the goal (A 300-07). The O&J required that the program include at least the following: 1) provision for a professionally validated journeyman examination to be administered at least once a year; 2) provision for a professionally validated apprenticeship entrance examination to be administered at least once a year; 3) provision for "detailed record keeping by Local 28 and the JAC including maintenance of separate records for whites and non-whites regarding the overall composition of the Local 28 work force and hours worked, individuals who apply for, take, and pass the apprenticeship and journeyman examinations and persons who seek to transfer into Local 28 or obtain permits; and 4) provision for a program of advertising and publicity in order to dispel petitioners' reputation for discrimination in the non-white community (A 308-13).

As is evident, the District Court determined, based on the history of petitioners' failure to comply with earlier State and federal court orders, that Local 28 and the JAC would not take any meaningful steps to end their unlawful discrimination against non-whites without a closely monitored and comprehensive program. Accordingly, the O&J required development of a plan that would keep the paths to union membership open and assure steady progress toward the level of non-white membership that would have existed in the absence of the pattern and practice of discrimination engaged in by Local 28 and the JAC.

The Affirmative Action Program ("AAP") entered in November 1975 pursuant to the O&J included all of the above components, each developed in great detail (A 230-54). It also set forth interim percentage goals (A 232), and provided that selection from among applicants who passed the apprenticeship and journeyman examinations was to be made according to a white/non-white ratio to be determined by the parties (A 234, 245). The AAP further provided that Local 28 could issue permits only with the express consent of the Administrator (A 241).

In 1976, the Court of Appeals affirmed Judge Werker's findings of discrimination against Local 28 and the JAC, finding that (A 212):

[t]here is ample evidence that all the routes into Local 28 have been blocked to minority group members as a result of discriminatory practices by Local 28 and the JAC. The trial record in this case is voluminous and the facts before the district court were more than adequate to sustain its findings. Local 28 and the JAC have consistently and egregiously violated Title VII.

In view of petitioners' "long and persistent pattern of discrimination," the Court of Appeals upheld the 29% membership goal as a temporary remedy, distinguishing it from "a quota used to bump incumbents or hinder promotion of present members of the work force" (A 222). The Court also approved the appointment of the Administrator (A 219). Like Judge Werker, the Court of Appeals concluded that (A 220):

[t]he apparent failure of the New York court order to change Local 28's membership practices to an appreciable extent and the rather reluctant response made by Local 28 to Judge Gurfein's orders convince us that it is necessary for a court-appointed administrator to exercise day-to-day oversight of the union's affairs.

The Court declined to permit the permanent use of any implementing ratios (A 223-25), although the interim use of such ratios pending the development of job-related tests was approved (A 225).^{*} The petitioners did not seek review in this Court.

In response to the 1976 opinion of the Court of Appeals, and to changed conditions in the sheet metal industry, the District Court entered a Revised Affirmative Action Program and Order ("RAAPO") in 1977 (A 183). For the most part, RAAPO carried forward the plan outlined in the AAP. The most significant difference was that the date for attaining the 29% goal was moved to 1982, and the interim goals adjusted accordingly, because the District Court had determined that depressed conditions in the sheet metal industry made achievement of the 29% goal

^{*} None of the orders to which the petitioners are now subject require that apprentices or journeymen be admitted pursuant to a white/non-white ratio.

by 1981 impracticable (A 183-84; JA 164-65). RAAPO also provided that apprentice classes be indentured twice annually and that the JAC forward its recommendations for class size to the Administrator no less than 90 days before the indenture of each class (A 192). With respect to publicity, RAAPO, like the AAP, required publicity campaigns prior to each journeyman and apprenticeship examination (A 203). It further required that prompt development of a general publicity campaign in efforts to enlarge the pool of eligible non-white applicants to Local 28 (A 203-04).*

In an October 1977 opinion, the Court of Appeals upheld RAAPO in its entirety (A 160). The Court of Appeals considered, but rejected by a divided vote, the union's contention that the 29% membership goal was excessive because it was based on the non-white percentage of the labor pool in New York City rather than a wider geographic area (A 167). Again, petitioners did not seek review in this Court.

V. The 1982 Contempt Proceeding

Between 1974 and 1982, the total non-white membership of Local 28 increased from 3.19% (A 165) to 10.8% (A 9), a mere 7.5 percentage points. The non-white journeyman membership in 1982 was only 6% (A 151). Petitioners had not come close to attaining the 29% non-white membership goal which, assuming compliance with RAAPO, they were expected to reach in July 1982. Nor had they sought to have the goal modified or to be relieved from any obliga-

*As Judge Werker noted in his 1975 opinion, Local 28's reputation for nepotism prevented non-whites from even attempting to contact the JAC regarding membership opportunities (A330 n.9).

tion under RAAPO. By 1982, it was clear that the failure to even approach the goal was the direct result of specific acts by petitioners in violation of the O&J and RAAPO and orders of the Administrator (A 453, 462-63; JA 130-32). Thus, in April 1982, the City and State moved for an order holding petitioners in contempt for violations of those orders. Petitioners cross-moved for an order terminating the O&J and RAAPO.

The Court conducted an evidentiary hearing on the motion and cross-motion and, in a decision rendered on August 16, 1982, found that petitioners had "impeded the entry of non-whites into Local 28 in contravention of [the Court's] prior orders" (A 150). Specifically, the Court found that defendants had (A 151-55):

1. underutilized the apprenticeship program, which is the primary method of entry into the union and thus the most promising source of non-white members;
2. failed to design or undertake the general publicity campaign which the District Court had found necessary to dispel petitioners' reputation for discrimination in the non-white community;
3. failed to maintain and submit records and reports essential to monitoring compliance with the O&J and RAAPO;
4. issued work permits without prior authorization of the Administrator as required by RAAPO; and
5. amended their collective bargaining agreement by adding a provision which discriminated

against Local 28's non-white journeyman members.

Although petitioners had failed to even come close to meeting the 29% goal, the District Court expressly declined to hold them in contempt on that basis (A 155-56). The Court indicated, however, that it was convinced that Local 28 and the JAC had failed to make good faith efforts to attain the goal (A 155-56). The District Court denied petitioners' cross-motion to terminate the O&J and RAAPO because the purpose of those orders had not yet been achieved (A 157).

A. Underutilization of the Apprenticeship Program

Despite the apprenticeship program's critical importance in bringing non-whites into the union in numbers sufficient to achieve steady progress toward the goal, petitioners trained substantially fewer apprentices after the District Court issued its 1975 O&J than before (A 484-85; JA 74). At the same time that the number of apprentices trained decreased, the ratio of journeymen to apprentices employed by Local 28 contractors rose as high as 18:1 (A 16), and the average number of hours worked per year by Local 28 journeymen steadily increased (JA 74).^{*} Between July of 1981 and March of 1982, employment oppor-

^{*}The Bureau of Apprenticeship, U.S. Department of Labor National Apprenticeship and Training standards for the Sheet Metal Industry recognized that an appropriate apprentice-to-journeyman ratio is 1:4 (JA 71). Local 28 agreed to employ that ratio when it registered its apprenticeship program with the New York State Department of Labor (A 16).

tunities so exceeded the available supply of Local 28 journeymen that Local 28 was compelled to issue over 200 work permits to non-member sheet metal workers to meet employers' needs (A 16).^{*} This was precisely the method by which Local 28 and the JAC had closed their doors to new members in the late 60's and early 70's and which the District Court found to be discriminatory (A 346). The District Court rejected petitioners' contention that the underutilization was the result of an economic slowdown and found that petitioners, still intent on resisting integration, had once again shifted employment opportunities from apprentices to its predominantly white, incumbent journeymen (A 151, 156).^{**}

^{*}In the decision holding petitioners in contempt (A 150-57), the District Court incorrectly compared the number of apprentices *enrolled* in all four years of the apprenticeship program between 1971 and 1975 with the number of new apprentices *indentured* between 1976 and 1981 (A 16, 151). However, the record reflects that the correct statistics support the finding that the JAC trained more apprentices between 1971 and 1975 than it trained between 1976 and 1981 (A 484-85; JA 74). Moreover, as the Court of Appeals majority noted, the finding of underutilization was not based on that finding alone (A 16, 151).

^{**}Despite petitioners' obligation under RAAPO to inform respondents and the Administrator of the size of the apprentice classes 60 days prior to indenture, they failed to provide the required information (A 15, 23, 143, 192, 462, 475). Respondents and the Administrator were therefore unable to timely review the apprentice class sizes. Petitioners' assertion that the Administrator approved each apprentice class is erroneous. See Pet. Brief on Merits at 9. The reports petitioners point to in support of this contention (A 42 n. 3), were those submitted monthly informing the Administrator of the number of apprentices in the JAC program and not the reports required to be submitted twice annually prior to the indenture of each class (A 23).

B. Failure to Implement a General Publicity Campaign

The O&J (A 312) and RAAPO (A 203-04) required Local 28 and the JAC to devise and implement a written plan for an effective general publicity campaign designed to dispel their reputation for discrimination in non-white communities. This requirement is separate and distinct from the advertising and publicity campaigns which the union must conduct prior to each apprenticeship and journeyman examination (A 203). This was intended to ensure that when opportunities to take the apprenticeship and journeyman examinations arose, non-whites would no longer feel that applications to Local 28 were futile. *See* Exhibit Volume to 1982 Appeal to the Second Circuit, Docket No. 82-6241 ("EV") at 174-75. Despite repeated requests, and in direct contravention of RAAPO, petitioners neither formulated nor implemented any such plan (A 152, 455, 471-72).

C. Record Keeping and Reporting Violations

Accurate reporting and record keeping is "absolutely vital to the effective monitoring and implementation of the RAAPO by the Administrator, the parties and the court" (A 154). The record supporting the 1982 contempt made clear that petitioners had failed to comply with RAAPO's reporting requirements and with specific requests for information by the Administrator (A 154, 158 n.8, 458-59, 472-74; EV at 71-74, 218-36, 466, 474-91). Judge Werker stated that this failure evidenced petitioners' "blatant disregard for their obligation to provide the appropriate parties to this suit with the information per-

tinent to the enforcement of the O&J and the RAAPO" (A 154-55).*

D. Unauthorized Work Permits

In July 1975, the District Court held that Local 28 utilized the permit system to restrict the size of its membership and that this practice illegally denied non-whites access to employment opportunities in the sheet metal industry (A 346). In order to monitor any future grants of permits, the O&J and RAAPO prohibited Local 28 from issuing any work permits except with the "express written consent of the Administrator . . ." (A 191, 315). Nonetheless, in violation of those orders, in March 1981, Local 28 again began issuing permits without the Administrator's written authorization. Before respondents discovered this, Local 28 had granted thirteen unauthorized permits, and only one was to a non-white (A 153-54, 460). Presumably, the entire 200 plus permits issued between July 1981 and March 1982 would have been issued without the prior approval required by the O&J and RAAPO had respondents not become aware of this activity.

E. The Collective Bargaining Agreement

Under the O&J, petitioners are permanently enjoined from engaging in "any act or practice which has the purpose or the effect of discriminating in . . . terms, con-

* Disregard for record keeping obligations was by 1982 a predictable behavior pattern for petitioners. Failures by petitioners to keep the records required by the New York State Supreme Court pursuant to the Corrected Fifth Draft prevented the District Court from conducting thorough analyses of apprenticeship examinations between 1964 and 1975 and the 1969 journeyman examination (A 331, 345; JA 312).

ditions or privileges of employment against any individual or class of individuals on the basis of race, color or national origin" (A 301). In violation of the O&J, Local 28 and the Contractors' Association amended their Collective Bargaining Agreement by adding a Memorandum of Agreement which provided (A 155):

During periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field.

The District Court, based on expert testimony, found that this provision (the "older workers' provivision") had a disparate impact on the predominantly non-white young members of Local 28, was not justified by business necessity, and was therefore discriminatory (A 155).

To remedy the effects of petitioners' contumacious conduct, the District Court ordered Local 28, the JAC and the Contractors' Association to pay a fine of \$150,000 into a fund (the "Fund"). The Fund was to be used to increase the non-white membership of the apprentice program in order to compensate for the years when Local 28's underutilization of the apprenticeship program severely impeded the entry of non-whites (A 156). The District Court also concluded that additional fines to coerce compliance with the orders of the Court and the Administrator were needed. Judge Wecker decided, however, that those fines would not be imposed until the Administrator submitted a program for the Fund and a report analyzing the need to modify RAAPO in view of the facts that petitioners' failure to abide by its terms had rendered the 1982 date for attainment of the goal meaningless (A 156-57).

VI. The 1983 Contempt Proceeding

Less than one year following the District Court's 1982 contempt decision, the City brought a proceeding before the Administrator charging Local 28 and the JAC with additional violations of the O&J and RAAPO (JA 16-20, 21-30). After a hearing, the Administrator found that Local 28 had violated the record keeping requirements of the O&J and RAAPO regarding transfers by failing to include in its reports any data regarding the new journeymen and apprentices who had become Local 28 members by virtue of Local 28's merger with five, predominantly white, sister sheet metal locals in 1981 and 1982 (A 129-32, 157). The Administrator noted that Local 28 had made no effort to inform the parties of the mergers or provide information about their effect on Local 28's membership until requested to do so by the Administrator (A 130). The Administrator also found that Local 28 had violated both the spirit and the letter of the District Court's record keeping requirements by failing to develop a system which provided verification controls to ensure that the reported data was accurate (A 132-33). Finally, the Administrator found that Local 28 had not met its obligation to serve copies of the O&J and RAAPO on contractors who signed collective bargaining agreements with Local 28 subsequent to November 1981, as required by his directive of November 20, 1981 (A 133-35).

With respect to the JAC, the Administrator found that its failure to provide accurate reports of the hours worked by Local 28 journeymen and apprentices deprived respondents and the Administrator of data that was essential to evaluating whether journeymen and apprentices were sharing equally in available employment opportunities (A 136).

In conclusion, the Administrator stated that the violations by Local 28 and the JAC were "part of a pattern of disregard for state and federal court orders and . . . a continuation of conduct which led the Court to find [petitioners] in contempt on August 16, 1982" (A 138). The District Court adopted all of the Administrator's findings (A 125-26).

Convinced that the violations underlying the 1983 contempt decision evidenced petitioners' continuing failure to appreciate the importance and necessity of compliance with its orders, the District Court imposed further coercive fines, the amount to be determined in conjunction with the establishment of the Fund. To remedy petitioners' failure to develop a comprehensive system of record keeping, the District Court ordered Local 28 and the JAC to finance a computerized record keeping system to be developed and maintained by an independent management firm (A 126).

VII. AAAPPO and the Fund

On August 31, 1983 the District Court entered an order establishing the Employment, Training, Education and Recruitment Fund (the "Fund") to receive petitioners' \$150,000 compensatory fine and coercive fines of \$.02 per hour for each journeyman and apprentice hour worked, which had been imposed on the basis of the two contempt decisions (A 113-14).*

The Fund will support a program designed to increase non-white membership in Local 28 and will be terminated

* The Fund is also supported by the City, which has paid its attorney's fees from the two contempt proceedings into the Fund (A 115).

when the Court determines it is no longer necessary (A 114, 116-18). In order to increase the pool of qualified non-white applicants for apprenticeship, the Fund will compensate Local 28 members for their services as liaisons to vocational schools, create part-time work for youths with sheet metal training and provide low-interest loans for first term non-white apprentices who would otherwise be unable to afford to enter the Local 28 apprenticeship program (A 116-17). The Fund will also support a program of tutoring and counseling for non-white apprentices so that they may enjoy the services which have always been readily available to white apprentices through fathers, uncles and friends (A 116-17). In order to maximize employment opportunities for all apprentices, the Fund will provide financial assistance to contractors unable to afford to meet the 1:4 apprentice to journeyman ratio, as well as matching funds to attract outside funding (A 117). Should petitioners desire, they are free to establish an identical program for whites (A 118).*

In November 1983, the District Court replaced RAAPPO with an Amended Affirmative Action Program and Order ("AAAPPO"), having concluded that violations of its prior orders had been so egregious that a new approach to apprentice selection was required (A 53, 111-12). Because petitioners had not succeeded in remedying the effects of their prior discriminatory conduct under RAAPPO, AAAPPO continued in effect the non-white membership

* The Fund offers assistance almost identical to that provided to a very limited number of non-white Local 28 apprentices through a government-sponsored program which has been extremely successful in helping non-white Local 28 apprentices complete their training and obtain jobs as skilled journeymen. See City's Motion to Lift Stay Order of Court of Appeals, filed in the Second Circuit on April 5, 1984, at 2-3.

goal and the office of the Administrator (A 54, 74-75). It was adjusted to 29.23% to reflect the increase in membership due to the merger and an increase in the non-white population of the relevant labor pool (A 54, 122-23). The projected attainment date is now August 31, 1987 (A 55). AAAPPO also replaces the apprenticeship aptitude examination with an Apprentice Selection Board, comprised of a representative each of the Court, petitioners and respondents. The Board is to establish standards and procedures for apprentice admission, (A 57-58, 112), and will remain until replaced by a validated apprenticeship examination (A 58-60). AAAPPO requires the JAC to assign each Local 28 contractor one apprentice for every four journeymen (A 60-61, 66-67), unless the contractor obtains a written waiver of the 1:4 ratio from respondents (A 67). These provisions are aimed at ensuring the maximum participation of non-whites in the apprenticeship program and preventing repetition of petitioners' pattern of underutilization. Finally, AAAPPO requires more detailed reporting than did RAAPPO and, in accordance with the remedy ordered pursuant to the 1983 contempt decision, requires petitioners to establish computerized record keeping under the supervision of an expert selected by respondents (A 70-74). As originally enacted, AAAPPO required apprentices to be indentured on the basis of one non-white for each white (A 57).*

VIII. The 1985 Court of Appeals Decision

The Court of Appeals affirmed all of the contempt findings made by the District Court except the finding based

* As explained, *infra*, at p.27, this provision was eliminated by the Court of Appeals (A 36-37).

on the older workers' provision (A 13-24).^{*} The Court also affirmed all but one of the remedies ordered by the District Court following the contempt decisions (A 25-37).

The Court of Appeals, by a divided vote, rejected the petitioners' argument that the 29.23% goal was an impermissible quota (A 31-33). Instead, it stated that it had twice before upheld race-conscious goals in this case as appropriate in view of petitioners' "clear cut pattern of long-continued and egregious racial discrimination," (A 31), and laid responsibility for the need to continue the goal at petitioners' feet "because it has been their foot-dragging resistance to compliance with the prior orders that has caused the District Court to extend the non-white membership goal until 1987" (A 32-33).

The Court of Appeals affirmed the 1 to 4 apprentice to journeyman ratio as necessary to ensure that there will be no further underutilization of the apprenticeship program by petitioners (A 33-34). The Court also upheld the institution of the Apprentice Selection Board to replace tests whose validity could not be demonstrated to respondents' satisfaction and modified AAAPPO to permit the use of validated selection procedures before the 29.23% goal is reached (A 34-35). The Court of Appeals reversed only the requirement that apprentices be indentured on the basis of one non-white for each white, concluding that the other provisions of AAAPPO and the Fund

* The Court of Appeals reversed the finding of contempt insofar as it was based on the older workers' provision, finding that even though petitioners and the Contractors' Association had agreed to the provision it had never been implemented, and thus its effect was still unknown. (A 17-19, 37).

are sufficient to ensure that petitioners will, at long last, do what is necessary to integrate their union in compliance with the law (A 36-37).

Summary of Argument

(1)

In this case, the petitioner union has been branded by the Court of Appeals for the Second Circuit as having acted "in bad faith" in circumventing the order of a state court, practiced "blatant . . . discrimination" against non-white Blowpipe workers and "consistently and egregiously violated Title VII." *EEOC v. Local 638*, 532 F2d 821, 826-27 (2d Cir. 1976) (A 212, 214, 215). A year later, the Court of Appeals characterized the discrimination practiced by the union as encompassing "direct methods employed to deny members of racial minorities entrance to the union." *EEOC v. Local 638*, 565 F2d 31, 36 n.8 (2d Cir. 1977) (A 169). Finally, in its most recent opinion, the Court of Appeals referred to the union's "determined resistance . . . to all efforts to integrate its membership," and its "foot-dragging egregious noncompliance" with the orders of the District Court. *EEOC v. Local 638*, 753 F2d 1172, 1183 (2d Cir. 1985) (A 24).

Consistent with the purposes of Title VII and what we believe to be the proper policies of this Nation, employment opportunities should be based, not on race or creed, but on the abilities of the individual. In most instances, other means of erasing discrimination are both more effective and desirable. For instance, random selection of apprentices, through the use of lotteries, might help to

overcome the effects of discrimination. Similarly, section 343-8.1 of the New York City Administrative Code requires that City agencies seek to ensure that 10% of their construction contracts are awarded to businesses which have a work force containing 25% or more economically disadvantaged workers, or which have performed substantial amounts of their work in poverty areas. However, the City is opposed, as a matter of public policy, to the use of racial employment quotas, or goals, which if coupled with sanctions and timetables, are the functional equivalent of quotas.

Accordingly, this Brief addresses itself only to the legality of the Fund for minority recruitment and training. In this case, petitioners' discriminatory animus is so strong, its history of non-compliance with court mandates is so extensive and the ingenuity with which it has devised schemes to defeat integration is so malevolent, that the Fund is required.

The City agrees with the following positions of the Government and the State: 1) that petitioners were properly adjudged in civil contempt; 2) that the challenge to the 1975 finding that petitioners had practiced discrimination against non-whites in violation of Title VII is not properly before the Court, and that in any event there is no basis for setting aside that finding; and 3) that consideration of the propriety of the appointment of an administrator in 1975 and the continuance of his office in 1983 are not properly before the Court and in any event the District Court properly acted within its discretion. The City also joins the State's argument that the Fund is a proper exercise of the Court's contempt power and

not limited by the provisions of Title VII. We are separately briefing the Title VII and Fifth Amendment implications of the Fund.

(2)

Race-conscious remedies are within the remedial powers of the District Court under Title VII, 42 U.S.C. 2000e *et seq.* The legislative history of Title VII shows that section 706(g), 42 U.S.C. 2000e-5(g), was not intended to preclude the District Court from awarding prospective, race-conscious relief but rather to assure that no relief be granted to one fired or not hired for a reason other than discrimination outlawed by Title VII. Prior opinions of this Court are consistent with this interpretation of section 706(g), *see Franks v. Bowman Transportation Co.*, 424 US 747 (1976); *Teamsters v. United States*, 431 US 324 (1977), and the Courts of Appeals have uniformly approved race-conscious remedies not necessarily benefitting only proven victims of discrimination. The long history of petitioners' intentional discrimination and avoidance of judicial mandates confirms the necessity of providing for the Fund.

The Fund satisfies the equal protection component of the Fifth Amendment. This Court has long recognized that courts may fashion race-conscious remedies to eradicate illegal discrimination, and that such remedies are constitutional. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971); *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 US 144 (1977). *See also Fullilove v. Klutznick*, 448 US 448 (1980). The cited decisions indicate that such remedies need not inure only to the benefit of identified victims of discrimination.

In light of the long history of egregious discrimination and contemptuous conduct by petitioners, the Fund is "necessary" to the accomplishment of a "constitutionally permissible" and "substantial" purpose. *Regents of the University of California v. Bakke*, 438 US 265, 305 (1978) (Powell, J.).

POINT I

Under the Facts of this Case, Which Reveal a History of Both Flagrant, Intentional Discrimination and Consistent Foot-Dragging in Response to Efforts to Remedy the Effects of Petitioners' Illegal Discrimination, the Order of the District Court providing for the Fund is a Proper Exercise of the Court's Remedial and Contempt Powers and is Consistent with the Provisions of Title VII.

(1)

Both the petitioners and the Government, in arguing that Title VII limits the award of race-conscious relief to instances of make-whole relief, rely substantially on the decision of this Court in *Firefighters Local Union No. 1745 v. Stotts*, — US —, 104 S Ct 2576 (1984). There this Court necessarily spoke only of make-whole relief in the context of a bona fide seniority system. Congress has given seniority systems special and explicit statutory protection under section 703(h) of Title VII, 42 U.S.C. 2000-2(h). *See Teamsters v. United States*, 431 US 324, 348-53 (1977). To extend the language of the opinion to stand for the proposition that race-conscious relief may not be

awarded under Title VII, without discussion of the unanimous holdings of the Courts of Appeals to the contrary, *see Stotts*, 104 S Ct at 2006 (Blackmun, J., dissenting), and without consideration of a record of egregious, intentional discrimination as is presented here, would be inappropriate for a court bound by the constraints of Article III. In this case, the Court of Appeals for the Second Circuit refused to take such an expansive reading of *Stotts* (A 30-31), as have other Courts of Appeals. *See* Brief of United States as Amicus Curiae in *Local Number 93 v. City of Cleveland*, Docket No. 84-1999, at 17 nn. 13 & 14. Accordingly, the issue of the permissible scope of prospective, race-conscious remedies intended not to "make whole" individual victims of discrimination but to both correct the class-wide effects of prior "patterns or practices" of discrimination and prevent their continuation in the future, is an open issue in this Court.

(2)

The central thesis of the Government is that section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), limits the power of a district court to awarding race-conscious remedies to identified victims of discrimination. The provision states, in pertinent part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appro-

priate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. * * * *No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title* (emphasis added).

The Government urges that the italicized language, consistent with the legislative history of Title VII, limits the court to make whole relief for proven victims of discrimination. Brief of United States as Amicus Curiae, *Local Number 93 v. City of Cleveland*, Docket No. 84-1999, at 6-19. The legislative history upon which the Government relies shows that the quoted language, which on its face relates only to retroactive rather than prospective relief, was intended to address the problem of awarding retroactive relief in "mixed motive" cases where the employer had a legitimate reason for not employing a particular individual. The language first appeared in the bill reported out of the House Judiciary Committee in 1964. *See* H.R. 7152, 707e, reprinted in EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 ("Legislative History"), at 2012 (1968). At that time the sentence provided that a court shall not grant relief to an individual refused employment, su-

suspended or discharged "for cause." See 29 U.S.C. 160(c) (parallel provision precludes National Labor Relations Board from granting relief to individual who "was suspended or discharged for cause"). While the "for cause" provision was subsequently deleted and substituted with the language "for any reason other than discrimination on account of race, color, religion, sex, or national origin," there is no indication that the amendment was intended to accomplish anything other than to avoid a requirement that the employer satisfy a formal definition of "cause." In introducing this amendment Representative Celler explained (110 Cong. Rec. 2567 [1964]):

[T]he purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion or national origin.

Congressman Gill similarly stated that under 706(g) as amended (110 Cong. Rec. 2570 [1964]):

[W]e would not interfere with discharges for ineptness or drunkenness. We would not interfere with unfair labor practices that are covered under other acts. We would limit orders under this act to the purposes of this act.

In the Senate, Hubert Humphrey stated of the last sentence of 706(g) (then 707e) (110 Cong. Rec. 6549 [1964]):

[It] makes clear what is implicit throughout the whole title: namely, that employers may hire and

fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex or national origin.

See also 110 Cong. Rec. 7214 (1964) (Clark-Case interpretative memorandum on Title VII).

In *EEOC v. AT&T*, 556 F2d 167 (3d Cir. 1977), *cert. denied sub nom. Alliance of Independent Telephone Unions v. EEOC*, 438 US 915 (1978), the Court of Appeals for the Third Circuit rejected the specific argument made here by the Government. The Court of Appeals traced the legislative history of the provision and held that it confirmed that the purpose of the last sentence of 706(g) was to "preserve[] the employer's defense that the non-hire, discharge, or non-promotion was for a cause other than discrimination." *EEOC v. AT&T*, 556 F2d at 175-77. Accordingly, Courts of Appeals have held that under the last sentence of 706(g), an employer would not be liable for back pay or other retroactive relief if he could prove that the individual would not have been hired or promoted even without the influence of the discriminatory motive. See *Stotts*, 104 S Ct at 2608-09 (Blackmun, J., dissenting), and cases cited therein.

In *Stotts*, 104 S Ct at 2589-90, Justice White, in holding that make-whole relief is available only to those who have been shown to be the actual victims of discrimination, remarked that various members of Congress had expressed fear that under Title VII an employer would be required to maintain a particular racial balance in its workplace. See, e.g., 110 Cong. Rec. 7212, 7213 (1964) (Clark Case interpretative memorandum on Title VII); 110 Cong. Rec. 4764 (1964) (remarks of Sen. Ervin and Sen. Hill); H.R. Rep. No. 914, (minority report), 88th Cong., 1st Sess., *reprinted in* 1964 U.S. Code Cong. Ad. News 2431, 2441. However, this con-

cern led to the passage of section 703-j, 42 U.S.C. 2000e2(j). See 110 Cong. Rec. 12723 (1964) (comments of Sen. Humphrey); 110 Cong. Rec. 12819 (1964) (explanation of changes to House bill by Sen. Dirksen); Legislative History, at 1008. This provision has been interpreted as defining liability under Title VII; accordingly, it does not restrict the use of race-conscious remedies. See *United Steelworkers of America v. Weber*, 443 US 193, 205 n.5 (1979); *United States v. International Union of Elevator Constructors*, 538 F2d 1012, 1019 (3d Cir. 1976); *Rios v. Enterprise Association Steamfitters Local 638*, 501 F2d 622, 630-31 (2d Cir. 1974); *United States v. Local Union No. 212*, 472 F2d 634, 636 (6th Cir. 1973). See also *Teamsters*, 431 US at 339-40 n.20 ([s]ection 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population); Cf. *Swann v. Charlotte Mecklenburg Board of Education*, 402 US 1, 17 (1971) (42 U.S.C. 2000e-6 does not limit remedial power of federal courts).

Any doubt about the power of the judiciary to award prospective, race-conscious relief was, even if then still in doubt, confirmed by the legislative history of the Equal Employment Opportunity Act of 1972, Public L. No. 92-261. That act substantially amended Title VII to provide, *inter alia*, for coverage of State and local employees and for increased duties and responsibilities to the Equal Employment Opportunity Commission. See H.R. Rep. No. 92-238, reprinted in 1972 U.S. Code Cong. & Ad. News 2137. However, during debate in the Senate, Senator Ervin proposed two amendments* to the Senate ver-

* Amendment No. 829 would have provided that:

No department, agency, or officer of the United States shall require an employer to practice discrimination in

(Footnote continued on following page)

sion of the House bill. While Senator Ervin complained of the actions of the Office of Federal Contract Compliance, he also sought to prevent the EEOC in enforcing Title VII from continuing to enter orders "requiring employers to practice discrimination in reverse." Subcommittee On Labor 92d Cong., 2d Sess. reprinted in EEOC Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Legislative History"), at 1045 (1972). He did not believe that "you can enforce laws against discrimination in employment by commanding and requiring discrimination in employment." *Id.* Senator Javits, leading the opposition to Senator Ervin's proposed amendments, pointed out that amendment No. 829 would necessarily limit the power of a court to issue race-conscious remedies. *Id.* at 1046. He stated that the amendment "would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment. . . ." *Id.* at 1048. He then had two court decisions printed in the record. In the second, *United States v. Ironworkers Local 86*, 443 F2d 544 (9th Cir.), cert. denied, 404 US 984 (1971), the Court of Appeals rejected an argument

(Footnote continued from preceding page)

reverse by employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges.

Amendment No. 907 would have amended section 703(j) to provide that: "[n]othing contained in this title, Executive Order 11246 or any other statute or executive order" would require an employer to grant preferential treatment. Subcommittee On Labor, 92d Cong., 2d Sess., reprinted in EEOC, Legislative History of the Equal Employment Opportunity Act of 1972, at 1017, 1681 (1972).

that race-conscious relief was precluded by 703(j). The Court also held that 706(g) contained no limit on a court's power to issue affirmative relief which it might deem appropriate to eliminate the vestiges of past discrimination and to terminate discriminatory practices. 443 F2d at 552-554. Senator Ervin's amendment No. 829 was defeated by a two-thirds majority. 1972 Legislative History, at 1074.* Rather, the final version of 706(g) affirmed the broad remedial powers of the court upon a finding of discrimination by expressly stating that the court, in ordering affirmative action, could, in addition to enumerated powers, order "any other equitable relief as the court deems appropriate."

Finally, in a report submitted by the Chairman of the Senate Committee on Labor and Public Welfare on the amended version of the House bill (H.R. 1746), it was stated (1972 Legislative History, at 1844):

In any area where the new law does not address itself, or in any area where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

The Government urges that this legislative history is irrelevant to the scope of a court's remedial power under Title VII. First, it urges that a law cannot be amended or repealed except by another statute; we agree with this

* Senator Ervin's second amendment, No. 907, was likewise defeated by a two-thirds vote of the Senate. 1972 Legislative History, at 1716-17.

self-evident proposition. However, the rejection of Senator Ervin's proposed amendments is an indication of Congressional agreement that a federal court may properly apply race-conscious, prospective relief under Title VII. See *EEOC v. AT&T*, 556 F2d at 177; *United States v. International Union of Elevator Constructors*, 538 F2d at 1019-20. See also *Bakke*, 438 US at 353-54 n.28 (Brennan, White, Marshall and Blackmun, J.J., concurring in part and dissenting in part). Cf. *Runyon v. McCrary*, 427 US 173, 174-75 (1976). Nor is this a case of reliance on "congressional silence alone" to show legislative adoption of judicial precedent. See, e.g., *Boys Markets, Inc. v. Retail Clerks Union*, 398 US 235, 241 (1970). Rather, we have spirited debate clearly showing a rejection of the statutory interpretation now tendered by petitioners and the Government.

(3)

The decisions of this Court prior to *Stotts* do not support the Government's and petitioners' view of a court's remedial powers under Title VII. The Government places great weight on this Court's decisions in *Franks v. Bowman Transportation Co.*, 424 US 747 (1976), and *Teamsters v. United States*, 431 US 324 (1977). In *Franks*, this Court held that section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), does not preclude make-whole relief in the form of an award of retroactive seniority to those shown to have been victims of illegal discrimination, and that such award is within the remedial powers of the District Court set out in section 706(g) of Title VII. 424 US at 777-79. The Court did not have before it, or in any way comment upon, the type of prospective, race-conscious relief implicated in this case. However, the decision, in dis-

cussing the propriety of an award of retroactive seniority, reconfirmed the broad remedial powers of the district courts set out in section 706(g). *Id.* at 763-66, 770.

Similarly in *Teamsters*, this Court was concerned with the effect of section 703(h), in that instance on liability, and held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 US at 355-56. While this Court then went on to discuss remedy, nothing in its discussion indicates that prospective relief under Title VII is impermissible if it inures to the benefit of persons other than actual victims. Rather, *Teamsters* dealt only with individual, retroactive relief. However, this Court recognized that class-wide prospective and individual retroactive relief required different showings in a pattern or practice case: prospective relief may be granted upon a mere finding of a violation; individual, retroactive relief could be awarded only after a showing that the claimant applied for a job during the period of discrimination, or, because of the discriminatory practices, failed to apply. *Id.* at 361, 362, 368. While concerned with retroactive relief, this Court in *Teamsters* noted that the federal courts have freely exercised their "broad equitable discretion to devise prospective relief" to eliminate discriminatory practices and their effects, and noted that the prospective relief in *Teamsters* had been incorporated in a consent decree.

This Court, while recognizing that the make-whole provisions of Title VII are a central component of the statutory scheme, see *Albemarle Paper Co. v. Moody*, 422 US 405, 419-421 (1975), and that the goal of Title VII is to assure that individuals be judged for employment

purposes on their abilities rather than on membership in a racial or other class, see *Los Angeles Department of Water and Power v. Manhart*, 435 US 702, 708 (1978), has made clear that Title VII is intended to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Albemarle*, 422 US at 417 (quoting *Griggs v. Duke Power Co.*, 401 US 424, 429-430 [1971]). See also Section 707 of Title VII, 42 U.S.C. 2000e-6 (Equal Employment Opportunity Commission may bring civil action where any person is engaged in pattern or practice of resistance to rights secured by Title VII, and may request such relief as is necessary to ensure full enjoyment of such rights). Prospective remedies are well within the power of the district courts, and four members of this Court, including the author of *Stotts*, have stated that under Title VII, preferential treatment may be required for those "likely disadvantaged by social discrimination . . . even without a requirement of . . . a case-by-case determination that those to be benefited suffered from racial discrimination." *Bakke*, 438 US at 366 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part). The Courts of Appeals have indicated their approval of prospective, race-conscious remedies not limited to proven victims of discrimination. See, e.g., *Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F2d 1017, 1026-28 (1st Cir. 1974), cert. denied, 421 US 910 (1975); *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F2d 256, 282 (2d Cir. 1981), cert. denied, 455 US 988 (1982); *United States v. International Union of Elevator Constructors*, 538 F2d 1012, 1017-20 (3d Cir. 1976); *Chisolm v. United States Postal Service*, 665 F2d 482, 498-99 (4th Cir. 1981); *United States v. City of Chicago*, 663 F2d 1354

(7th Cir. 1981) (en banc); *United States v. Ironworkers Local 86*, 443 F2d 544 (9th Cir. 1971), cert. denied, 404 US 984 (1971); *United States v. Lee Way Motor Freight*, 625 F2d 918, 943-45 (10th Cir. 1979). See also *Thompson v. Sawyer*, 678 F2d 257, 294 (10th Cir. 1982) (interim goals approved); *United States v. City of Alexandria*, 614 F2d 1358, 1363-66 (5th Cir. 1980) (consent decree). The Courts of Appeals have upheld race-conscious remedies because, under appropriate circumstances, they may be necessary to put an end to the effects of prior discriminatory practices, which is the express purpose of a pattern or practice case. Cf. *United States v. International Brotherhood of Electrical Workers*, 428 F2d 144, 149-50 (6th Cir. 1970).

The history of petitioners' discrimination and avoidance of court orders makes clear the necessity of the Fund. Their response to the State Court finding of illegal discrimination, and to the requirement that an objective apprenticeship selection procedure be implemented, was to use union funds to prepare friends and relatives of union members for the apprenticeship entrance examinations (A 214). Rather than organize the predominantly black blowpipe industry, they issued permits to white sister locals (A 214-15). Years later, petitioners were held in contempt for, *inter alia*, reducing the size of their apprenticeship program to keep new members out, failing to carry out a general publicity campaign to recruit non-whites, and failing to develop a comprehensive and reliable reporting system or file the reports crucial to evaluating compliance with the very orders they repeatedly violated (A 9-10, 151-57). The Fund is, at this juncture, the least that can be done to ensure that petitioners remedy the effects of their discrimination in a way that is meaningful.

The Fund meets this Court's criteria for race-conscious remedies. It is temporary, *United Steelworkers of America v. Weber*, 443 US 193, 208 (1979); *Fullilove v. Klutznick*, 448 US 448, 510, 513 (Powell, J. concurring) (1980), and narrowly tailored to remedy the effects of the favoritism shown by petitioners to relatives and friends, their underutilization of the apprenticeship program and their failure to undertake the publicity campaign required by RAAPO. *Fullilove*, 448 US at 483 (Burger, C.J.), 498, 510, 513-14 (Powell, J.). Its imposition follows the failure of numerous alternative remedies. *Fullilove*, 448 US at 510, 511 (Powell, J.). Perhaps most important, the Fund has no negative impact on anyone. *Weber*, 443 US 208; *Regents of the University of California v. Bakke*, 438 US 265, 318 n.52 (Powell, J.) (1978). Moreover, petitioners are free to provide identical services to whites and, to the extent that this does not diminish the Fund's effectiveness in achieving its purposes, may use money from the Fund to do so (A 76, 118).*

POINT II

The Fund Satisfies the Equal Protection Guarantee of the Fifth Amendment Because it Is Necessary to the Accomplishment of a Constitutionally Permissible and Substantial Purpose.

The first 28 pages of this brief are devoted to a detailed account of 20 years of outrageously discriminatory conduct by petitioners. The purpose of the Fund is to eliminate continuing effects of that discrimination and open

* The Fund is supported by precedent. The statute approved by this Court in *Fullilove* required grantees of federal funds and their prime contractors to provide minority business enterprises with financial and technical assistance as needed. 448 US 448, 481 (1980). See also *Southern Illinois Builders Association v. Ogilvie*, 471 F2d 680 (7th Cir. 1972).

membership in Local 28 to non-whites. The history of this litigation compels the conclusion that the Fund is essential to the accomplishment of that task, and thus is constitutional.

(1)

This Court has long recognized that courts are empowered to employ the full range of their traditional powers of equity in fashioning remedies to eradicate the effects of identified discrimination and that the use of racial classifications toward that end may be necessary and is constitutional. This principle was implicitly recognized in *Green v. County School Board of New Kent County*, 391 US 430 (1968), which held that a race-neutral system of pupil assignment, adopted by the New Kent County School Board more than ten years after it was ordered by this Court to cease maintenance of officially segregated schools, was inadequate to meet the Board's obligation to remedy segregation. This Court in *Green* stressed that courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 391 US at 438 n.4 (quoting *Louisiana v. United States*, 380 US 145, 154 [1965]).

In *United States v. Montgomery County Board of Education*, 395 US 225 (1969), this Court went further and upheld the constitutionality of race-based remedies to eliminate segregation among school faculty and staff. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 US 1, 16-31 (1971), this Court again gave explicit expression to the companion principles that the task of a court in framing a remedy for intentional discrimination is to "correct, by a balancing of the individual and collective interests, the con-

dition that offends" and that the use of flexible race-conscious measures to do so is constitutional if "reasonable, feasible and workable." 402 US at 16, 19, 25, 31. See also *McDaniel v. Barresi*, 402 US 39, 41 (1971); *North Carolina State Board of Education v. Swann*, 402 US 43, 46 (1971).

Moving beyond the area of school desegregation, this Court again held race-conscious remedies for discrimination constitutional when it approved New York State's right to deliberately create or preserve black majorities in reapportioning voting districts to ensure compliance with federal voting rights laws, even though the reapportionment was voluntary and not a measure required to remedy a constitutional or statutory violation. See *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 US 144 (1977). And one year later, in *Regents of the University of California v. Bakke*, 438 US 265, 320 (Powell, J.), 325, 355-56 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part) (1978), five Justices of this Court unequivocally held that a state medical school may take race into consideration in its admissions program when there has been an appropriate determination that particular minority groups have suffered discrimination impairing their ability to compete for admission.

Most recently, in *Fullilove v. Klutznick*, 448 US 448, 482-83 (Burger, C.J., joined by White and Powell, JJ., 495, 496 n.1 (Powell, J., concurring), 522 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring), 525 n.4 (Stewart, J., dissenting) (1979) this Court upheld the constitutionality of a federal statute establishing a racial preference; the statute required, *inter alia*, that at least ten percent of federal funds for any local public works

project be awarded to construction companies owned or operated by members of minority groups. The statute rested on evidence of pervasive discrimination in the construction trades, and was not a remedy for specific instances of identified discrimination.

Contrary to the assertions of petitioners and the Government, there is no support for the contention that race-conscious remedies must inure to the benefit of "identifiable" victims of discrimination if they are to be constitutional. See, e.g., *Swann*, 402 US at 16-31; *United Jewish Organizations*, 430 US at 154-68; *Fullilove*, 448 US 448. The race-conscious relief approved in these cases has not been limited to providing retroactive, compensatory or restitutionary relief to specific individuals injured by past acts of discrimination. Rather, the approved relief has been designed to operate prospectively at a systemic level to dismantle formerly segregated systems and to ensure integration. Such relief is indispensable in cases such as this where petitioners' discriminatory reputation has deterred job applications from individuals "unwilling to subject themselves to the humiliation of explicit and certain rejection." *International Brotherhood of Teamsters v. United States*, 431 US 324, 365 (1977).*

* In a parallel context, this Court has sanctioned gender-based State and Congressional measures enacted with the express purpose of redressing general societal ills born of longstanding discriminatory treatment. See, e.g., *Califano v. Webster*, 430 US 313 (1977); *Schlesinger v. Ballard*, 419 US 498 (1975); *Kahn v. Shevin*, 416 US 351 (1974).

(2)

The Fund satisfies the strict level of scrutiny utilized by this Court in analyzing equal protection challenges to race-conscious remedies: these remedies are "necessary" to the accomplishment of a "constitutionally permissible" and "substantial" purpose. *Bakke*, 438 US at 305 (Powell, J.).*

The purpose of the Fund—the eradication of the effects of petitioners' blatant discriminatory practices—has been found by this Court to be "constitutional" and "substantial" under equal protection analysis. *Fullilove*, 448 US at 476 (Burger, C.J., joined by White and Powell, JJ.), 496, 497, 508 (Powell, J., concurring), 542-43 (Stevens, J., dissenting), 528 (Stewart, J. dissenting); *Bakke*, 438 US at 307 (Powell, J.); *McDaniel v. Barresi*, 402 US at 41; *Weber*, 443 US at 202-04, 208.

And, as required by the Constitution, the Fund is necessary to provide non-whites with the support that has for so long been available only to the white relatives and friends of Local 28 members because of petitioners' exclusionary practices.** The record is replete with examples of Local

* The appropriate analysis to apply in determining whether a particular remedy satisfies constitutional standards remains an open question in this Court. Since the Fund meets the traditional strict scrutiny standard, and exceeds all lesser standards, there is no need for the Court to decide this issue.

** The means selected to remedy discrimination must be narrowly drawn, but need not be the least restrictive means of redress. *Fullilove*, 448 US at 498, 508. The choice is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." *Id.* at 508 (Powell, J., concurring) (quoting *Franks v. Bowman Transportation Co.*, 424 US 747, 764 [1976]).

28's animosity toward non-whites and petitioners' willingness to violate State and federal court orders. There is no point in reiterating all of the tactics used by petitioners to defeat the State and District Courts' attempts to integrate Local 28. Nor is there any dispute that the efforts have thus far been unsuccessful. After almost 20 years under court orders, as of April 1982, Local 28 was still 89.2% white (A 9). The petitioners and the Government would have this Court believe that by simply removing identified barriers to non-white employment, Local 28 will become an integrated union. The record in this case demonstrates that this is not so. The lesson of Local 28 is that it is not enough to identify and remove obvious roadblocks to non-white union membership because petitioners will simply resort to discriminatory measures which are not expressly prohibited. The Fund is crucial if Local 28 is to become an integrated union.

CONCLUSION

The Judgment of the Court of Appeals Should Be Affirmed Except that Portion of the Judgment Which Upheld the 29.23% Goal. In Addition, the Court Should Remand the Matter to the District Court for the Consideration of Additional Sanctions in View of the Egregious Conduct of the Petitioners.

January 25, 1986

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the City of
New York,
*Attorney for Respondent the City
of New York.*

LEONARD KOERNER,
STEPHEN J. McGRATH,
LORNA B. GOODMAN,
LIN B. SABERSKI,
of Counsel.

RESPONDENT'S

BRIEF

JAN 27 1986

STEPHEN SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION,
LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

-against-

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, THE CITY OF NEW YORK, and NEW
YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

**BRIEF OF RESPONDENT NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

LAWRENCE S. KAHN
COLVIN W. GRANNUM
JANE LEVINE
MARTHA J. OLSON
Assistant Attorneys General
MARGARITA ROSA
General Counsel
New York State Division of
Human Rights
55 West 125 Street
New York, NY 10027

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
New York State Division
of Human Rights
Two World Trade Center
New York, New York 10047
(212) 488-3943

ROBERT HERMANN
Solicitor General

O. PETER SHERWOOD
Deputy Solicitor General
Counsel of Record

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QUESTIONS PRESENTED

1. Are challenges in this Court to rulings made a decade ago in this action now barred?
2. May a party held in contempt for violating an injunction, avoid sanctions on the basis of a claim that the sanctions are not authorized by the statute on which the underlying injunction was based?
3. Assuming the Court concludes that questions concerning the scope of Title VII remedies should be addressed, does Title VII of the Civil Rights Act of 1964 require that a court's remedial order, entered after a finding of consistent and egregious racial discrimination, always be so narrowly drawn as to preclude granting prospective race-conscious relief benefiting individuals who have not been specifically identified as the victims of the defendant's unlawful discrimination?
4. Does the fifth amendment bar a court from enforcing its remedial orders by imposing civil contempt sanctions containing race-conscious provisions which benefit persons who are not necessarily the identified victims of unlawful discrimination?
5. Assuming the Court concludes that rulings made ten years ago are still open for review: Did the district court properly conclude (a) that petitioners had violated Title VII of the Civil Rights Act of 1964 and (b) that the court had authority to appoint an administrator to oversee the day-to-day implementation of that court's remedial orders?

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STATEMENT OF THE CASE

I. *Preliminary Statement*

The contempt orders before the Court constitute the most recent in a two decade-long, judicially supervised effort to compel Local 28 of the Sheet Metal Workers International Association ("Local 28") and its Joint Apprenticeship Committee ("JAC") to comply with local, state and federal fair employment laws. Since 1964, Local 28 and the JAC (collectively referred to as "the Local" or "petitioners") have been found repeatedly to have discriminated unlawfully against minorities, to have "consistently and egregiously" violated the fair employment laws and to have "defied" enforcement orders (A. 212, 215).¹ Nevertheless, they now are asking the Court to rewrite that history. They claim that the ten-year old liability determination of the district court was wrong, that important elements of the district court's long-standing remedial order are unauthorized and that they should not have been held in contempt.

The United States government² initiated this case in 1971, established liability, urged the remedial measures adopted by the court and repeatedly defended all of the court's remedial and coercive orders (JA. 5-8, 157-61, 275-83, 372-74). The Equal Employment Opportunity Commission ("EEOC"), which is represented in this Court by the Solicitor General,³ agrees with

¹ The designation "A. ____" refers to pages in the appendix to the Petition for Writ of Certiorari. The designation "JA. ____" refers to pages of the Joint Appendix.

² This action was filed on June 29, 1971, on behalf of the United States (JA. 372, 344). In April 1974, as a result of the 1972 amendments to Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e-6(c), the Equal Employment Opportunity Commission was substituted for the United States as plaintiff. (JA. 344).

³ Because the argument of the United States in this case is set forth in briefs filed in four separate cases currently before the Court and the EEOC appears in only this case, respondent will refer to the United States or the EEOC, as the case may be, as simply the "Solicitor." The form of citation used for referring to the Solicitor's briefs in the four cases is as follows:

Brief for the EEOC in No.
84-1656, *Local 28 v. EEOC*

Sol. Loc. 28 Br. ____

(footnote continued)

respondents City of New York ("City") and New York State Division of Human Rights ("State") that petitioners properly were held in civil contempt and that the sanctions ordered constituted, with an important exception, appropriate civil contempt remedies. Nonetheless, the Solicitor now contends that the 29% goal, and the race-conscious aspects of the contempt order it too joined in seeking, are beyond the power of the district court.

The contempt orders draw their significance from the facts found and the extensive prior proceedings in this case. Because neither the petitioners nor the Solicitor have adequately described the facts and prior proceedings, respondent restates them below.

II. *Proceedings Against Local 28 Prior to This Federal Court Action.*

Local 28 was formed in 1913 under an international union constitution which contemplated the establishment of racially segregated "white local union(s)" and, if necessary, black "auxiliary local unions." The black unions were to be "subordinate to the established and affiliated white local union" (A. 322, JA. 318). Although racial restrictions were deleted from the international constitution in 1946, Local 28 retained its racially exclusive character until 1969, long after the effective date of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") (JA. 314, 333-34). The union did not waver in its racially restrictive admissions practices except under court orders (A. 411, JA. 320, A. 215, 300, 182, 125, 119, 111, 108). See also *New York State Commission for Human Rights v. Farrell*, 47 Misc. 2d 799, 263 N.Y.S. 2d 250 (Sup. Ct. N.Y. Co. 1965).

In 1964, the New York State Commission For Human Rights⁴ found petitioners guilty of a continuing pattern of unlawful

Amicus curiae brief for the United States
in No. 84-1999, *Local 93 v. City of
Cleveland*

Sol. Loc. 93 Br. ____

Amicus curiae brief for the United States
in No. 84-1340, *Wygant v. Jackson Board of
Education*

Sol. Wygant Br. ____

Amicus curiae brief for the United States
in No. 85-177, *Orr v. Turner*

Sol. Orr Br. ____

⁴ In 1968, the State Commission was reorganized and renamed the New York State Division of Human Rights. See 1968 N.Y. Laws ch. 958.

discriminatory practices caused by pervasive nepotism within the union as well as a naked policy of not admitting blacks (JA. 381, 407). It ordered petitioners to "cease and desist from denying to . . . Negroes because of their race . . . the right to be admitted to . . . the sheet metal apprenticeship program" (JA. 388).

Because the Local ignored its order, later that year the Commission commenced a proceeding in the New York State Supreme Court to force compliance (A. 411). Justice Jacob Markowitz confirmed that the Local had violated the New York Law Against Discrimination. He supervised negotiations aimed at racially integrating the union and creating a remedial program which substituted an objective apprentice selection procedure for the existing nepotistic selection system (A 415, 421). Justice Markowitz ultimately entered an order, entitled the "Corrected Fifth Draft of Standards for the Admission of Apprentices" ("Corrected Fifth Draft"), which provided for selection of apprentices on the basis of education, written test scores and personal interviews (A. 427, 431). He rejected Local 28's suggestion that "some preference" be given applicants with familial ties to union members (A. 421). The parties also negotiated an agreement, approved by the court, requiring the JAC to indenture two 65-person apprenticeship classes. See *Farrell*, 47 Misc. 2d at 799. As these agreements were reached, Justice Markowitz noted that the adopted plan "was the result of the unusual cooperative spirit" of the parties (A. 425; see also A. 440). Although not acknowledged by petitioners, "by 1965, Justice Markowitz' praise had turned to fury" (A. 139) because the union had disregarded its court-ordered obligations. Claiming unemployment among its members, the union reduced the size of the second apprentice class from 65 to 30. In his decision ordering the union to comply with his previous order, Justice Markowitz declared: "[t]he union, unilaterally, is attempting to halt or severely limit the process of its legally required integration" *Farrell*, 47 Misc. 2d at 800. By 1969, however, the union had devised a means of circumventing Justice Markowitz's prohibition of nepotism in the selection of apprentices: it began paying for pre-examination training sessions for

⁵ Participation in the apprenticeship program is the principal means of admission to membership in Local 28 (A. 325, JA. 303).

relatives of union members (A. 352). Furthermore, in the areas governing access to work in the construction sheet metal trade that had not been specifically addressed by Justice Markowitz, the union's policy of racial exclusion continued unchecked. See p. 5, *infra*.

III. Federal Court Proceedings Prior to the Contempt Motion

In June 1971, the United States Department of Justice, pursuant to Title VII, filed this suit against the Local to enjoin a pattern and practice of discrimination against black and Spanish surnamed individuals ("minorities") who sought membership in Local 28 and training and job opportunities in the sheet metal trade in New York City. At that time (seven years after the State had first taken action), minorities constituted 1.63% of the union's membership (JA. 323). The City intervened and alleged, *inter alia*, that the union and JAC were violating the City's fair employment practices ordinance, Bl-7.0 of the New York City Administrative Code ("NYC Code § ____"), and were frustrating the City's efforts, through its contract compliance program, to increase training opportunities for minorities.⁶

A. Judge Gurfein's Consent Orders

In early 1974, work stoppages occurred on New York City and New York City Board of Education construction sites. They were aimed at preventing sheet metal contractors from employing minority trainees on City and Board of Education funded construction projects. In response, the Sheet Metal Contractors Association ("Contractors Association") sought a court order in this action restraining Local 28 from engaging in such work stoppages⁷ (JA. 355). As a result of this court action, the late United States District Judge Murray Gurfein, in April and July,

⁶ The Local joined the State as a third party defendant but the State was realigned as a plaintiff (A. 319).

⁷ As of 1974, Local 28 was the only union local in New York City that refused to participate voluntarily in the New York Plan For Training, the program that provides for the training and employment of minority "trainees" on federal and New York State construction projects in New York City (JA. 354, 320).

1974, entered consent orders which required the JAC to indenture at least 40 minority apprentices by September 30, 1974 (JA. 363-64, 356). The union did not meet the September 30 deadline. It did little to comply with Judge Gurfein's orders until it faced the immediate threat of a contempt finding⁸ (A. 352, JA. 345-47, 356-58).

B. Liability Determination

Following a trial in 1975 before the late United States District Judge Henry Werker, the court found that petitioners had intentionally discriminated against minorities in violation of both Title VII and NYC Code § Bl-7.0 by administering discriminatory entrance examinations; excluding persons who lacked a high school diploma; offering cram courses to the sons and nephews of union members but not to minority applicants; refusing to accept blowpipe sheet metal workers for membership because most such workers were members of minority groups; consistently discriminating in favor of white applicants seeking to transfer into Local 28 from sister locals; refusing to administer journeyman examinations because of their concern that minority candidates would do well, and, instead, issuing work permits to non-members on a discriminatory basis; and failing to organize non-union sheet metal shops owned by or employing minorities (A. 330-50).

On the basis of these findings and a recognition that the "record in both state and federal court against these defendants is replete with instances of . . . bad faith attempts to prevent or delay affirmative action" (A. 352), the court, on August 29, 1975, entered, pursuant to Fed. R. Civ. P. 54, an Order and Judgment ("O&J"). It enjoined petitioners from all violations of Title VII and ordered them to achieve, by July 1, 1981, a remedial goal of 29% minority membership (JA. 142, A. 305, 354). This goal was based on the

⁸ Petitioners refer to these consent orders when they declare that "racial hiring pursuant to fixed and intransigent percentages has been involved in this action even before the entry of the O&J in 1975." Pet. Br. at 5 n.7. While claiming that "these orders were complied with," (*id.*) petitioners neglect to acknowledge that, as the court of appeals observed, compliance occurred "under heavy pressure" (A. 215). Petitioners also contend that they "objected" to Judge Gurfein's orders, Pet. Br. at 42, a contention which is unsupported by the record (JA. 356-58).

relevant minority labor pool in New York City (A. 300, 305, 353-54). The court also ordered petitioners to eliminate the diploma requirement for the apprenticeship program, to offer non-discriminatory entrance exams for journeymen and apprentices, and to allow transfers and issue temporary work permits on a non-discriminatory basis (A. 354-56, 301-04, 308-10). Petitioners were required to engage in extensive recruitment and publicity campaigns in minority neighborhoods in order to dispel Local 28's reputation for discrimination and to ensure a broad applicant pool (A. 355, 312). They were also directed to maintain records regarding applications, requests for transfer, inquiries about permit slips and hiring (A. 355, 310-11). The court appointed an administrator to supervise compliance with its decree (A. 355, 305-07).

C. *The First Appeal (1976)*

On appeal, the Court of Appeals for the Second Circuit affirmed, finding ample evidence that petitioners "consistently and egregiously violated Title VII" (A. 212). Indeed, the Local "[did] not even make a serious effort to contest the finding of Title VII violations" in this initial appeal (A. 215). The court upheld the 29% goal as a temporary remedy, distinguishing it from "a quota used to bump incumbents or hinder promotion of present members of the work force" (A. 221-22). It also upheld the requirement that entrance examinations be validated and ruled that the testing schedules and recruitment requirements imposed by the district court were appropriate exercises of the district court's discretion (A. 222). The court modified the relief ordered by eliminating any provision that "might be interpreted to permit white-minority ratios for the apprenticeship program after the adoption of valid, job-related entrance tests" (A. 225). It concluded that the appointment of an administrator with broad powers was "clearly appropriate," given petitioners' failure to change their membership practices pursuant to the prior orders of the district court and the New York State court (A. 220).

The Local did not seek review in this Court of the court of appeals' judgment, which finally determined all issues in the action.

D. *Entry of RAAPO*

On January 19, 1977, following the court of appeals' affirmation, the district court issued a revised affirmative action program and order ("RAAPO") (A. 182). Among other things, RAAPO granted the Local an additional year in which to meet the 29% membership goal. The court ordered the Local to make "substantial and regular" progress every year in admitting minorities to Local 28 (A. 183). Modifications were also made to provide that, during a time of widespread unemployment in the industry, apprentices would share equitably in available employment opportunities in the industry (A. 183-84). The court ordered the JAC to take all reasonable steps to insure that apprentices receive adequate employment opportunities and to indenture two classes of apprentices each year, the size of each class to be determined by the JAC, subject to review by the administrator (A. 192-93).

E. *The Second Appeal (1977)*

The union and JAC appealed six provisions of RAAPO, including the apprenticeship indenture requirement and a provision granting certain oversight powers to the administrator (A. 165). They also challenged the imposition of the goal and, on the basis of the intervening decision of this Court in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), disputed the 1975 finding of liability (A. 164-68). The court of appeals rejected petitioners' arguments based on *Hazelwood*, affirmed RAAPO in its entirety and upheld the administrator's powers (A. 160, 165-68). Once again, the Local did not seek a writ of certiorari from this Court, even though Judge Meskill in dissent invited them to do so (A. 170 n.1).

IV. *The Contempt Proceedings*

In 1982, the City and State, recognizing that Local 28 would not achieve the 29% goal by July 1 because it had failed to comply with several substantive provisions of the O&J and RAAPO, moved for an order holding petitioners in contempt. The union and JAC cross-moved for an order terminating the O&J and RAAPO.

A. *The First Contempt Decision (1982)*

Following a hearing, the district court found that the Local had "impeded the entry of minorities into Local 28 in contravention of the prior orders of this court" (A. 149-50).⁹ Judge Werker held them in contempt for violating the O&J and RAAPO by a) underutilizing the apprentice program to the detriment of minorities; b) failing to undertake, as required by RAAPO, a general publicity campaign intended to dispel petitioners' reputation for discrimination; c) failing to maintain and submit records and reports; d) issuing work permits without prior authorization of the administrator; and e) entering into an agreement amending their collective bargaining contract by adding a provision that discriminates against Local 28's minority members by protecting members aged fifty-two or over during periods of high unemployment. The cumulative effect of these contemptuous acts, the district court ruled, was that the Local failed even to approach the 29% goal, a benchmark of progress toward integration and equal employment opportunity¹⁰ (A. 155-56).

The first contempt holding was based in part on the district court's finding that petitioners had deliberately underutilized the apprenticeship program in order to limit minority membership and employment opportunities. The court found that the JAC trained substantially fewer apprentices after entry of the O&J than before. The court rejected the Local's contention that the underutilization of the apprenticeship program resulted from a downturn in the economy. To the contrary, the average number

⁹ Petitioners' assertion, Pet. Br. at 9, that they had achieved a minority membership in Local 28 of 14.9% by April 1982 was rejected by both the district court and the court of appeals (A. 9). Petitioners' own April 1982 census showed its minority membership to be only 10.8%. Similarly, petitioners' claim that 45% of their apprentice classes are made up of minorities, Pet. Br. at 9, is misleading. Only since January 1981 have petitioners indentured apprenticeship classes consisting of 45% minorities (A. 37).

¹⁰ Although Local 28's total minority journeyman and apprentice membership was then only 10.8%, more than 18 percentage points below the ultimate goal petitioners had been ordered to reach by July 1, 1982, the district court did not base its finding of contempt upon petitioners' failure to reach the goal (A. 155). Instead the court focused on the union's failure to make regular and substantial progress toward integrating minorities into its membership (A. 155-56).

of hours and weeks worked per year by Local 28 journeymen members steadily increased from 1975 to 1981 (A. 16, 151). In fact, by 1981, employment opportunities so exceeded the available supply of Local 28 journeymen that Local 28 was compelled to issue an extraordinary number of work permits to non-member sheet metal workers, most of whom were white (A. 16). Thus, the court concluded that during the years after entry of the O&J, Local 28 deliberately shifted employment opportunities from apprentices to predominantly white, incumbent journeymen.¹¹ That the ratio of journeymen to apprentices rose from 7:1 before the O&J was entered to 18:1 by 1981, well above the industry standard of 4:1, demonstrated the extent of the shift (A. 16).¹²

The court based its finding that petitioners issued permits without the administrator's approval upon evidence that Local 28 had done so thirteen times between March and June 1981. Of the thirteen unauthorized permit men, only one was minority. These contemptuous acts were particularly significant given the district court's earlier finding, after trial, that Local 28 had used the permit system to restrict the size of its membership with the illegal effect of denying minorities access to employment opportunities in the sheet metal industry (A. 345-46).

Local 28 was also held in contempt for entering into a Memorandum of Agreement with the Contractors Association to guarantee older (age 52 or older) sheet metal workers one of every four jobs during periods of high unemployment (the "older workers' provision"). The district court concluded that this provision violated the O&J since it had the foreseeable consequence of disadvantaging the predominantly young minority members of the union (A. 155).

¹¹ Petitioners erroneously assert, Pet. Br. at 9, that the administrator approved each apprentice class. What petitioners mistakenly refer to are the reports ultimately submitted to the administrator informing him of the number of apprentices in the JAC program (A. 42 n.3). The administrator neither approved nor disapproved individual apprentice classes.

¹² As the majority opinion of the court of appeals illustrates (A. 22-24), neither petitioners' argument nor Judge Winter's dissent demonstrates that the underutilization finding was clearly erroneous. Fed. R. Civ. P. 52(a); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

Finally, petitioners were held in contempt for violating the provisions of the O&J and RAAPO requiring them to devise and implement a written plan for an effective general publicity campaign designed to dispel their reputation for discrimination in minority communities (A. 152-53). The general publicity plan required by the O&J and RAAPO was never formulated, much less implemented (A. 152). Finally, the union and JAC were held in contempt for failing, since 1976, to comply with the important reporting requirements of the O&J and RAAPO and with the administrator's request for information relevant to the implementation of RAAPO (A. 154-55).

The district court denied petitioners' cross-motion to terminate the O&J and RAAPO, finding that their purposes had not been achieved and that these orders had not caused the Local unexpected or undue hardship (A. 157).

B. *The Second Contempt Decision (1983)*

On April 11, 1983, the City brought a proceeding against the Local for additional violations of the O&J and RAAPO. After a hearing, the administrator found that the Local had again acted contemptuously by failing to provide data required by the O&J and RAAPO, failing to send copies of the O&J and RAAPO to all new contractors in the manner ordered by the administrator, and failing to provide accurate reports of hours worked by apprentices (A. 127, 128-38). The district court adopted the administrator's findings and again held the Local in contempt (A. 125).

C. *The Fund Order*

To remedy petitioners' past noncompliance, Judge Werker imposed a fine of \$150,000 for the first series of contemptuous acts and additional fines of \$.02 per hour for each journeyman and apprentice hour worked for the second series of contemptuous acts (A. 113, 114). These fines are to be placed in an interest-bearing Local 28 Employment, Training, Education and Recruitment Fund (the "Fund") to be used, among other things, to provide financial assistance to contractors otherwise unable to meet a 4:1 journeyman-to-apprentice ratio, to provide incentive or matching funds to attract additional funding from governmental or private job training programs, to establish a tutorial program for

minority first year apprentices, and to create summer or part-time sheet metal jobs for minority youths who have had vocational training (A. 116-18). The Fund is to "remain in existence until the [new minority membership] goal set forth in the Amended Affirmative Action Program and Order ("AAAPO") . . . is achieved and until the Court determines that it is no longer necessary" (A. 114). The Fund is subject to AAAPPO, which provides that Local 28 may provide whites with the benefits afforded under the program to minorities (A. 76, 118, 253). Upon termination, any sums that remain are to be returned to the union (A. 116).

D. *AAAPO*

Because the remedial purposes of RAAPO had not been achieved and because of the Local's contemptuous conduct, the district court on November 4, 1983, entered a new replacement order, AAAPPO (A. 53, 111). AAAPPO modified RAAPO in a number of respects. It adjusted the minority membership goal from 29% to 29.23% to reflect Local 28's expanded jurisdiction (due to the merger of several unions into Local 28) and a population change in the relevant labor pool (A. 54, 122-23). It extended the deadline for meeting the goal until August 31, 1987 (A. 55). It also required that one minority applicant be indentured into the apprenticeship program for each white applicant indentured and that (unless this provision were waived by plaintiffs) the JACs assign each Local 28 contractor one apprentice for every four journeymen (A. 57).

E. *The Third Appeal (1984)*

Petitioners appealed to the court of appeals from the contempt orders, the Fund order and the order adopting AAAPPO. They did not appeal the denial of their cross motion to terminate the O&J and RAAPO (A. 12), nor did they contend that the 1975 findings of liability were erroneous or that the administrator should not continue in office.¹³ By a 2-1 vote, the court of appeals affirmed all of the district court's findings of contempt against

¹³ The Local argued that the administrator's powers should be curtailed to limit his authority to adjudication of disputes under AAAPPO. See Brief for Appellants Local 28 and the JAC at 92.

the Local, except the finding based on the older workers' provision.* It also affirmed the contempt remedies, including establishment of the Fund. With respect to the first contempt proceeding, the court of appeals held that the evidence "solidly supports Judge Werker's conclusion that defendants underutilized the apprenticeship program" (A. 17). The court concluded, "[p]articularly in light of the determined resistance by Local 28 to all efforts to integrate its membership, . . . the combination of violations found by Judge Werker . . . amply demonstrates the union's foot-dragging egregious noncompliance . . . and adequately supports his findings of civil contempt against both Local 28 and the JAC" (A. 24). With respect to the second contempt proceeding, the court held that the district court's determination was supported by "clear and convincing evidence which showed that defendants had not been reasonably diligent in attempting to comply with the orders of the court and the Administrator" (A. 22).

The court affirmed AAAPPO with two modifications: it set aside the requirement that one minority apprentice be indentured for every white, concluding that the ratio was unnecessary in order to assure progress toward the goal, and it modified AAAPPO to permit the use of validated selection procedures before the 29.23% membership goal is reached. In addition, the court concluded that the Fund was an appropriate coercive and compensatory contempt remedy. The district court had aimed the relief at the apprenticeship program, where it would be most effective, and the Fund would compensate those who had suffered the most from defendants' contemptuous conduct. It also noted the Fund's coercive aspects and observed that its operation would cease and any remaining monies would be returned when the Local reached the 29.23% goal (A. 26).

For the third time, the court reaffirmed the 29.23% membership goal, finding that it met the court of appeals' two-pronged

* The court of appeals did not overturn the finding that the provision violated the O&J, but concluded that "the older workers' provision was never implemented, and therefore did not have any effect—discriminatory or otherwise—on nonwhites" (A. 17). It remanded this issue for further fact finding and directed that if the provision were found to discriminate, the district court should "strike it from the collective bargaining agreement. . ." (A. 19). Since this finding was the sole basis for the orders directed at sheet metal contractors, the court of appeals vacated the district court's orders as to them (A. 37).

test for the validity of a temporary, race-conscious affirmative action remedy (A. 29). First, the remedy was designed to correct a long, continuing and egregious pattern of race discrimination. Second, the remedy "will not unnecessarily trammel the rights of any readily ascertainable group of non-minority individuals" (A. 32).

Finally, the court rejected the Local's attempt to curtail the powers of the administrator (A. 36).

This judgment of the court of appeals affirming the contempt orders is here on review.

SUMMARY OF ARGUMENT

Ten years ago, after finding a pervasive pattern of racial exclusion and noting a record of past noncompliance with court orders directing the union to end discrimination, the district court entered a series of comprehensive remedial orders. These orders were intended to do more than restate the proscriptions of Title VII against discrimination and compensate individuals specifically harmed by the union's prior conduct. They were also designed to insure, through the imposition of effective remedial measures, that the union did not return to its discriminatory ways.

Given the union's failure to "clean house," the court determined that the imposition of a remedial racial goal was "essential" and directed that "regular and substantial progress" be made toward reaching it. The goal was essential because the practices, habits and customs within the union had, for generations, made racial exclusion a fixed part of its members' daily lives and expectations. Because access to admission, membership, training and employment in the trade ordinarily was obtained through informal contacts among union members, the district judge in this case knew that he would have no greater success than the judges who preceded him in altering the indifference within the union to fair employment laws unless substantial numbers of minority workers were to become part of the informal mutual support system that pervades the trade.

1. The district court determined liability and established the numerical goal and the office of the administrator a decade ago. The legitimacy of these determinations was upheld by the court

of appeals and no further review was sought. Accordingly, *res judicata* bars further review of the correctness of these rulings, which, in any event, were correctly made.

2. The court of appeals correctly concluded that the district court acted properly in holding petitioners in civil contempt. It noted 1) that the effect of the combined violations found by the district court operated to prefer the largely white group of journeymen over the racially integrated group of apprentices and 2) that the union historically "resisted . . . all efforts to integrate its membership" (A. 24).

The court of appeals also correctly concluded that the sanctions imposed were designed to coerce compliance with the two remedial orders of the district court. The sanctions imposed were designed to assure plaintiffs and the intended beneficiaries of the remedial orders that, unlike prior judicial orders directing the union to comply with the fair employment laws, the O&J and RAAPO would be obeyed. The sanctions were also intended to provide compensatory relief to the class of persons harmed by petitioners' persistent discriminatory conduct. The numerical goal is an integral part of the sanctions imposed: it is a means of verifying whether petitioners have discharged their legal obligation to eradicate the effects of prior discrimination and whether they have thereby purged themselves of contempt.

3. Section 706(g) of Title VII arms courts with authority to enter effective remedial orders which will work to achieve the Act's purposes. That authority includes the power to order *prospective* race-conscious remedies, such as the relief ordered in this case, that extend benefits to individuals who are not necessarily the identified victims of prior unlawful discrimination. The plain language of Title VII, its legislative history and court decisions confirm that courts possess authority to enter such orders.

This Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984), is not to the contrary. It concerned awards of *retrospective*, make-whole relief which affected the seniority expectations of white workers while not advancing Title VII's primary purpose of achieving equality of opportunity and barring future racial discrimination. In contrast, the remedies

ordered here are *prospective* remedies which advance the primary purposes of Title VII, do not implicate the seniority expectations of other workers, and only minimally affect the interests of white applicants and members of Local 28.

A rule that bars courts from granting prospective race-conscious relief to individuals who have not been specifically identified as the victims of the defendant's unlawful discrimination disserves the central purposes of Title VII "to achieve equality of opportunity and to remove barriers that have operated in the past to favor identifiable groups of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). If the statute were interpreted to limit relief in all cases to identified victims, employers or labor organizations bent on avoiding the command of Title VII would be encouraged to "bury their dead" by discouraging submission of applications by individuals of the unwanted race, sex, religion or national origin; failing to retain applications submitted by those persistent enough to complete and submit them; maintaining an informal, word-of-mouth system of job referrals to which white workers, by virtue of familial and friendship ties, have greater access; and adopting a range of other schemes which assure perpetuation of exclusionary practices while minimizing identification of victims of the discriminatory system. The facts of this case illustrate why the application of inflexible, "victim-specific" strictures, which petitioners and the Solicitor urge the Court to read into section 706(g), will undermine rather than foster the central purposes of this historic legislation. Congress did not intend this result.

I. PETITIONERS' CHALLENGES TO RULINGS MADE A DECADE AGO ARE UNTIMELY

Petitioners challenge, *inter alia*, the district court's original findings of race discrimination, its imposition in the O&J and RAAPO (now AAAPPO) of race-conscious remedies, including a 29% goal, and its establishment of the office of the administrator. These rulings, made a decade ago, were twice affirmed by the court of appeals. No review was sought in this Court within the proper time limits and accordingly, these rulings are *res judicata*. They may not be resurrected for review by petitioners' challenge

to the court of appeals' affirmance of the district court's 1982 contempt finding.¹⁵

Petitioners failed to seek review in this Court of these decisions and they cannot do so now. Sup. Ct. R. 20 and 28 U.S.C. § 2101 require that certiorari be sought no later than ninety days after entry of the judgment to be reviewed. The 1976 and 1977 appeals finally determined all of the issues then in the case, including the finding of liability and the validity of the goal and the office of the administrator. As this Court has stated, "the judgment. . . was final and appealable. Since [it was not appealed] we cannot now consider whether the judgment was in error." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 n.5 (1980); *accord Pasadena Board of Education v. Spangler*, 427 U.S. 424, 432 (1976).¹⁶

¹⁵ In any event, petitioners did not challenge below the determination of their liability under *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), or the continuation of the administrator in office. For this reason alone, the Court should not consider these issues. See Sol. Loc. 28 Br. at 17, 22. *Brandon v. Holt*, 105 S.Ct. 873, 879 n.25 (1985); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 759-61 n.6 (1984); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioners erroneously contend that respondents "never questioned the appealability" in the court of appeals of the issues of the legality of the goal and the administrator. Pet. Reply Br. on the Pet. for Cert. at 7. The State argued in the court of appeals that "the inquiry on appeal should be limited to [petitioners'] challenges to the specific remedial provisions added by the AAPO." Brief for Plaintiff-Appellee State Division of Human Rights, at 33 (emphasis added). See also Brief for the EEOC at 16. The court of appeals agreed that its previous decisions in this case were reason enough to dispose of petitioners' arguments concerning the goal and the administrator (A. 29, 31).

¹⁶ The denial of petitioners' motion to terminate the O&J by the district court, not appealed to the court of appeals, clearly is not before this Court. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978). In any event, the motion to terminate did not revive petitioners' right to challenge the finding of liability, imposition of the goal or the office of the administrator. Although *res judicata* does not apply when a motion to modify is made after a final judgment, *Arizona v. California*, 460 U.S. 605, 619 (1983), the moving party must demonstrate sufficiently changed conditions of law or fact to warrant relief. *Id.* at 624-25. Petitioners could not allege that the applicable statute, Title VII, had changed since entry of the decree, *System Fed'n No. 91 v. Wright*, 364 U.S.

(footnote continued)

Because the 1976 and 1977 judgments of the court of appeals were final and review was not timely sought in this Court, *res judicata* bars further litigation of all issues that were or could have been decided by those judgments.¹⁷ As the Court succinctly stated in *Arizona v. California*:

[L]itigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which, after appeal, the binding finality of *res judicata* and collateral estoppel will attach.

642 (1961), nor did they present any new factual circumstances justifying relief from the judgment (A. 157). This Court's decision in *Stotts*, 467 U.S. 561, does not justify a modification of the judgment: *Stotts* did not change the interpretation given Title VII, but merely applied existing law. See Point III, *infra*. Moreover, even if *Stotts* had changed the decisional law interpreting Title VII, petitioners could not use the decision as a basis for excusing their failure to appeal the 1976 and 1977 judgments as they were free, following the judgments, to seek a ruling from this Court that race-conscious remedies were not permissible. When they chose not to use that opportunity, the judgment became *res judicata*.

Moreover, "modification is not a means by which a losing litigant can attack the court's decree collaterally." 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2962 at 600-01 (1973); *accord* 7 J. Moore, *Moore's Federal Practice* ¶ 60.27[2] at 274 (2d ed. 1985) (Fed. R. Civ. P. 60(b) (6) "cannot be used as a substitute for appeal. Absent exceptional and compelling circumstances, failure to obtain relief through the usual channels of appeal is not another reason justifying relief."); *McKnight v. United States Steel Corp.*, 726 F.2d 333, 338 (7th Cir. 1984); *House v. Secretary of Health & Human Services*, 688 F.2d 7, 9 (2d Cir. 1982). See *System Fed'n No. 91*, 364 U.S. at 647-48; *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932); *Restatement (Second) Judgments* § 73 at 197-98 (1982).

¹⁷ Even applying the more flexible law of the case doctrine, see 1B Moore's *Federal Practice* ¶ 0.405[2] at 188-90, the Solicitor agrees with the State that many of the issues raised by petitioners may not be reviewed by this Court. See, e.g., Sol. Loc. 28 Br. at 16-17 (the 1975 liability finding) and Sol. Loc. 28 Br. at 21-22 (challenge to the administrator's appointment and powers). The Solicitor's logic applies equally to review of the goal and other race-conscious relief affirmed in 1976 and 1977. It was certainly foreseeable when the race-conscious relief was imposed in 1975 that failure to make real and substantial progress toward the goal would be met with stern measures. There was thus no excuse for the union's failure to seek review of the race-conscious relief in 1976.

460 U.S. 605, 619 (1983).¹⁸ See also *Federated Department Stores v. Moitie*, 452 U.S. 394, 398-99 (1981).

Further, "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948); accord *United States v. Rylander*, 460 U.S. 752, 756-57 (1983). The Third Circuit has explained the reasons for this rule:

If a civil contemnor could raise on appeal any substantive defense to the underlying order by disobeying it, the time limits specified in [the Federal rules] would easily be set to naught [,] . . . present[ing] the prospect of perpetual relitigation, and thus destroy[ing] the finality of judgments of both appellate and trial courts.

Halderman v. Pennhurst State School & Hospital, 673 F.2d 628, 637 (3d Cir. 1982) (*en banc*), *cert. denied*, 465 U.S. 1038 (1984).

The rule that a party may not relitigate in a contempt proceeding an issue previously decided is simply an application of ordinary *res judicata* principles. *United States v. Secor*, 476 F.2d 766, 770 (2d Cir. 1973) ("To permit such a collateral attack would be to make a mockery of the well settled doctrine of *res judicata*."). See also *Daly v. United States*, 393 F.2d 873, 876 (8th Cir. 1968); *World's Finest Chocolate Inc. v. World Candies, Inc.*, 409 F. Supp. 840, 844 (N.D. Ill. 1976), *aff'd*, 559 F.2d 1226 (7th Cir. 1977), and cases cited therein.

Petitioners attempt to avoid the application of *res judicata* by citing cases permitting a party to challenge both a civil contempt

¹⁸ *Arizona v. California*, cited by the Solicitor in support of his contention that *res judicata* is inapplicable here, actually supports the State's view that the court of appeals' 1976 and 1977 judgments bar review of the matters resolved therein.

In *Arizona v. California*, this Court, in the exercise of its original jurisdiction, decided to apply *res judicata* principles rather than law of the case to preclude relitigation of factual and legal issues long ago decided, even though the decree involved was not final. 460 U.S. at 618-19; *id.* at 644 (Brennan J., concurring in part and dissenting in part).

finding and an underlying temporary restraining order or preliminary injunction. Pet. Br. at 36, n.25. These cases are irrelevant when a party violates an unappealed *permanent* injunction:

[W]here, instead of a temporary injunction, a permanent injunction is violated, the interest in enforcement consists not only of the need to maintain respect for court orders and for judicial procedures, but also of the need to avoid repetitious litigation. This latter interest, the interest which the doctrine of *res judicata* serves in all of its applications, militates in favor of barring collateral attacks upon permanent injunctions in civil contempt proceedings as well as in criminal ones.

NLRB v. Local 282, International Brotherhood of Teamsters, 428 F.2d 994, 999 (2d Cir. 1970) (emphasis added).¹⁹

The adjustment of the 29% goal to 29.23% in AAAPPO by the district court in August 1983 (A. 119), did not remove the issue of the legality of the imposition of the goal from the reach of *res judicata*. As the district court noted, "[t]he new goal of 29.23% essentially is the same as the goal set in 1975" (A. 123). Petitioners may not avoid the effects of *res judicata* by challenging what is essentially a reiteration of a prior order. *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952); *Class v. Norton*, 505 F.2d 123, 125 (2d Cir. 1974); *Sidney v. Zah*, 718 F.2d 1453, 1457 (9th Cir. 1983).

Nor may petitioners avoid the consequences of *res judicata* by citing intervening decisional law, even from this Court:

[T]he *res judicata* consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the

¹⁹ The district court's retention of jurisdiction did not transform the O&J and RAAPPO into a non-final judgment and order, the provisions of which might still be subject to review. See *Special Project, The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 846 (1978). The retention of jurisdiction simply permits the district court, without finding subsequent violations of Title VII, to modify the remedies it ordered "to effectuate the equal employment opportunities for nonwhites and other appropriate relief" (A. 316). See *Morrow v. Crisler*, 491 F.2d 1053, 1055 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974).

judgment may have been wrong or rested on a legal principle subsequently overruled in another case.

Federated Department Stores, Inc., v. Moitie, 452 U.S. at 398. See also *Nevada v. United States*, 463 U.S. 110, 130 (1983), (citing *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) ("The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever . . .") (emphasis added)). Therefore, even assuming, *arguendo*, that petitioners and the Solicitor are correct in their interpretation of the Court's decision in *Stotts*, 467 U.S. 561, but see p. 48, *infra*, the imposition of the goal and other race-conscious relief contained in AAPO nevertheless must be affirmed.

Accordingly, petitioners are barred from relitigating in this Court issues decided by the court of appeals in 1976 and 1977.

II. AAPO AND THE FUND ARE APPROPRIATE EXERCISES OF CIVIL CONTEMPT POWERS

Petitioners contend that they were held in contempt for failure to meet the 29% goal, Pet. Br. at 40, and that their due process rights were violated because the sanctions imposed under the Fund order were, in petitioners' view, criminal contempt sanctions. *Id.* at 39. The Solicitor argues that, while the Local was properly held in civil contempt and the fines imposed were proper overall, the race-conscious aspects of the Fund order are contrary to the express dictates of §706(g) of Title VII and should be excised. We address these contentions here.

A. Clear and Convincing Evidence Supports the Contempt Findings Below

The district court based the contempt findings²⁰ upon various and repeated clear violations of the O&J and RAPO which demonstrate the Local's unflagging and unabashed commitment

²⁰ The propriety of the findings underlying the second contempt judgment is not before this Court inasmuch as the petition does not raise it as an issue. See Sup. Ct. R. 21.1(a); *Berkemer v. McCarty*, 104 S.Ct. 3138, 3153 n.38 (1984). Nonetheless, in that proceeding, the evidence establishing the Local's non-compliance was so overwhelming that petitioners offered only token opposition (A. 22).

to impede the entry of minorities into Local 28 (A. 125-26, 155). Those orders were designed to prohibit petitioners from discriminating further against minorities seeking union membership and "to assist in the achievement of the [29%] goal" (A. 123). Contrary to the assertions of the Solicitor and petitioners, Sol. Loc. 28 Br. at 8, Pet. Br. at 40, neither the district court nor the court of appeals rested the contempt finding on petitioners' failure to meet the 29 percent minority membership goal by the date prescribed in the RAPO. Citing no less than seven separate violations, see pp. 8-10 and 12, *supra*, those courts agreed that "the collective effect of these violations has been to thwart achievement of the 29 percent goal of non-white membership in Local 28 established by the court in 1975" (A. 155-56).

The findings underlying the first contempt order are supported by "clear and convincing evidence." *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir.), *cert. denied*, 454 U.S. 832 (1981). Except for the charge that petitioners underutilized the apprenticeship program, petitioners virtually conceded below and concede here the other violations cited — issuance of unauthorized work permits, failure to propose and conduct a general publicity campaign and failure to maintain and submit vital records (A. 13,23).

Petitioners' contention that the record does not support a finding that they underutilized the apprenticeship program was exhaustively examined and rejected by the court of appeals (A. 15-16). Additionally, as we have already shown, the record supports the finding that the Local had underutilized the apprenticeship program to the detriment of minorities. See pp. 8-9, *supra*. At this stage of the litigation, review by this Court of the sufficiency of the evidence is neither warranted nor appropriate. See *National Collegiate Athletic Association v. Board of Regents*, 104 S. Ct. 2948, 2959 n.15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

The underutilization of the apprenticeship program coupled with the three other violations cited by the court of appeals in support of the first contempt order unequivocally established that petitioners attempted to defeat two of the central provisions of the RAPO: "to assure that substantial and regular progress is made toward this goal. . ." and "to assure apprentices of Local

28 share equitably in all available employment opportunities" (A. 183-84).²¹

B. The Fund and AAPO Constitute a Precisely Crafted Civil Contempt Sanction Rather Than a Criminal Penalty

The gravamen of civil contempt is its remedial purpose. See *Penfield Co. v. SEC*, 330 U.S. 585 (1947); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911). Civil contempt sanctions may be imposed "for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947). The provisions of the Fund and AAPO reflect the district court's exercise of its power "to grant the relief that is necessary to effect compliance with its decree[s]." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949); see *Milliken v. Bradley*, 433 U.S. 267 (1977). Here, after petitioners violated not only numerous specific provisions of the O&J and RAPO, but just as importantly their unambiguous objective, full remedial relief was necessary to secure compliance with the underlying decrees. *McComb*, 336 U.S. at 193. That this was the court's purpose may be seen from the fact that the Fund order and AAPO permit petitioners to purge themselves of contempt. *Shillitani v. United States*, 384 U.S. 364 (1966). The Fund order expressly terminates and money remaining in the Fund is to be returned to petitioners once they attain the goal and thereby demonstrate the eradication of prior discrimination and its effects (A. 114).²² AAPO contains a similar provision (A. 55).²³

²¹ Even if this Court were to disagree with the lower courts' underutilization finding, the first contempt judgment should be upheld because it is supported by at least three other violations and the district court did not place primary emphasis on the underutilization finding (A. 155).

²² The goal is thus an integral part of the Fund because it operates as a signal of when petitioners have purged themselves of contempt.

²³ Petitioners incorrectly contend that the Fund is not a coercive sanction because its termination is also contingent upon the court's determination that the Fund is no longer necessary. This case is indistinguishable from *Shillitani* where the petitioner was sentenced to prison for two years or until the further order of

(footnote continued)

The terms of the Fund and AAPO are based on experience and are reasonably crafted to coerce petitioners to admit minority members and, in so doing, to remedy the consequences of petitioners' contemptuous acts. The Fund is aimed at increasing minority membership in Local 28 by augmenting the pool of qualified minority applicants for the apprenticeship program (A. 116), ¶¶6b,c,i,j. To this end, some provisions require the creation of support services for minority apprentices, including tutorial and counseling services (A. 116), ¶¶6a,d; educational stipends (A. 117), ¶6e; and low-interest loans for apprentices who demonstrate financial need.²⁴ *Id.*, ¶6f. Other provisions are designed to stimulate an overall increase in employment opportunities so that more minority apprentices may be hired. Thus, paragraph 6(h) provides financial reimbursements to any employer who demonstrates it cannot afford to hire additional apprentice to meet the 1:4 apprentice-to-journeyman requirement of AAPO, and paragraphs 6(i) and 6(j) are directed at generating more training and employment opportunities, which will increase minority employment and membership in Local 28 (A. 116-18).

Furthermore, paragraph 6(b) of the Fund, which requires creation of part-time and summer sheet metal jobs for qualified minority vocational students, when coupled with the general publicity requirement of AAPO, is intended to operate to develop the interest and awareness of minority youth in sheet

the court. 384 U.S. at 360. Rejecting the petitioner's characterization of that contempt sanction as a criminal penalty, this Court held that the clear intent of the sentence was to obtain answers to the questions for the grand jury—"to coerce, rather than punish." *Id.* at 370. Likewise, no doubt exists that if petitioners comply with the 29.23% minority membership goal, the court will terminate the Fund and petitioners will be permitted to recover any monies remaining (A. 114, 116). Here too, the purpose is to coerce, rather than punish. See *Doyle v. London Guar. & Accident Co.*, 204 U.S. 599, 603 (1906).

²⁴ These services also counter-balance partially the deeply entrenched system of mutual self-help among the white members that has long been a characteristic of this union, see p. 51 n.55, *infra*, JA 402-03 and A.140, which has operated to disadvantage minorities seeking admission and employment. Until minorities are fully integrated into the union in substantial numbers, the tradition within the union to "take care of its own" will, as this Court has recognized in the school desegregation cases, continue to perpetuate the effects of the union's racially segregated past. See, e.g., *United States v. Montgomery Board of Education*, 395 U.S. 225, 227 (1969).

metal jobs. These programs aim to counteract Local 28's self-imposed isolation from minority communities. Paragraphs 6(g) and 6(e) seek to maintain minority membership by encouraging development of advanced skills by minority apprentices and journeymen who are unemployed (A. 117). Similarly, the 1:4 apprentice-to-journeyman requirement contained in AAPO will ensure that the Local will not again circumvent the requirement that apprentices share equitably in all job opportunities (A. 34). Operating together, the provisions of the Fund represent a well-designed plan to reverse Local 28's racially discriminatory admission practices by increasing minority participation in the Local's activities.

Likewise, the 29.23% minority membership goal coerces petitioners to comply with the O&J and AAPO and serves as the only objective measure of petitioners' progress toward integration. The goal is necessary, "particularly in light of the determined resistance by Local 28 to all efforts to integrate its membership. . .," and its "foot-dragging egregious noncompliance with the O&J and RAPO" (A. 24) See pp. 49-52, *infra*.²⁵

The compensatory character of the Fund is also apparent. That some compensation is appropriate was evident from the nature of the violations. Underutilization of the apprenticeship program has resulted in the unwarranted rejection of minority applicants. The Local's failure to conduct a general publicity campaign perpetuated the Local's discriminatory reputation among minorities who might otherwise have been attracted to the sheet metal trade. Its failure to submit timely and accurate reports deprived the court of the ability to monitor the Local's compliance and as a result weakened the entire remedial scheme. Its unauthorized issuance of work permits as well as the issuance

²⁵ The other contempt sanctions sustained by the court of appeals, the requirement that petitioners pay for computerized record-keeping and the assessment of attorney fees and expenses, are readily identifiable as civil contempt sanctions. Sol. Loc. 28 Br. at 14-15. Petitioners do not dispute this point. The computerized record-keeping provision clearly coerces compliance with the record-keeping requirement of the court's orders, while the award of fees and expenses compensates plaintiffs for the costs of litigating the contempt proceedings. *Gompers*, 221 U.S. at 445.

of over 200 permits harmed minority journeymen who are not affiliated with favored sister locals and is symptomatic of continued discriminatory practices. The overall effect of these contumacious acts has been to undermine the remedial plan outlined in the O&J and RAPO. As a direct consequence, the Local has injured the class of minorities interested in becoming sheet metal workers, the intended beneficiaries of the O&J and RAPO.

The Fund is designed to compensate these injured persons by attracting qualified minorities to the apprenticeship program, fostering an improved working environment for new and existing minority apprentices and journeymen, and providing strong support services to assist the progress of each of these groups. The Fund thereby works "to compensate those who had suffered most from defendants' contemptuous underutilization of the apprenticeship program" (A. 26). It does so "not with a money award, but by improving the route they most frequently travel in seeking union membership." *Id.* The compensatory feature of the Fund is justified because petitioners' dogged failure to comply with the O&J and RAPO has frustrated the relief awarded to plaintiffs, economically injured the intended beneficiaries of those orders, and caused monetary damages to be unquantifiable (A. 154, 128, 23).

Petitioners also contend that the sanctions imposed exceed the standards for permissible contempt sanctions "because nothing is payable to any complainant or related to any actual loss." Pet. Br. at 39. Petitioners view the civil contempt power too narrowly. By necessity, the district court exercised civil contempt power commensurate in scope, force and ingenuity with the "determined resistance" and "foot-dragging egregious noncompliance" (A. 24) it sought to remedy. *Hutto v. Finney*, 437 U.S. 678 (1978); *United States v. United Mine Workers*, 330 U.S. at 303. A compensatory contempt sanction need not compensate a party for the precise amount of his loss. For example, in *McComb*, 336 U.S. at 193-95, unpaid wages were awarded to nonparty employees and in *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455 (1931), the compensatory relief awarded exceeded the injured parties' losses.²⁶

²⁶ Other characteristics of the contempt proceeding establish that it was civil in nature. In this regard, the contempt action was between the original parties, (footnote continued)

See also *Hutto v. Finney*, 437 U.S. at 691 (a civil contempt fine may combine compensatory and coercive characteristics).

A perfect match between the contempt sanction and the injury inflicted is not required as long as the sanction is reasonably directed at securing compliance with the court's orders, *id.*, or compensating the class of persons injured by the defendants' contempt. In this case, the remedy imposed did both. Accordingly, AAPO and the Fund are appropriate civil contempt sanctions.

C. The Civil Contempt Sanctions Imposed Are Not Limited by Title VII

A federal court has "inherent power" to prevent obstruction of its authority by acts of "force, guile or otherwise." *United States v. Armour & Co.*, 398 U.S. 268, 274 (1970) (Douglas J., dissenting). These powers are rooted in common law, Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161 (1908), and are essential to the operation of the judiciary:

The inherent powers of federal courts are those which "are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34 (1812). The most prominent of these is the contempt sanction, "which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court. . . ." *Cooke v. United States*, 267 U.S. 517, 539 (1925); see 4 W. Blackstone, Commentaries 282-285. Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.

and was instituted and tried as part of the main civil proceeding. *Gompers*, 221 U.S. at 445. In addition, the district court awarded costs to plaintiffs as compensation for their successful prosecution of the contempt proceedings. *Id.* at 447. Furthermore, the first order of the district court imposing contempt fines expressly relied upon civil contempt guidelines articulated by this Court in *United Mine Workers*, 330 U.S. at 304: the character and magnitude of the harm threatened by continued contumacy, the probable effectiveness of any suggested sanction in bringing about the desired result, and the consequent seriousness of the burden to defendants (A. 156).

Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); see also *Ex Parte Robinson*, 86 U.S. 505 (1873).²⁷

Inherent judicial powers are independent of statutory causes of action and, unless specifically limited by statute,²⁸ are fully available to render complete justice. *McComb*, 336 U.S. at 193; *Porter v. Warner Holding Co.*, 328 U.S. 398 (1946). Otherwise, the scope of inherent powers is broad, flexible, and limited only by the traditional usage of the particular power²⁹ and the Constitution. *Milliken v. Bradley*, 418 U.S. 717; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); see *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 406 (1971) (Harlan, J., concurring). It follows that inherent powers are not to be laid aside by questionable inferences from or doubtful constructions of statutory provisions. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836).

Anyone who is covered by the terms of an injunction is subject to sanctions for violations of its provisions unless the injunction was "transparently invalid or had only a frivolous pretense to validity." *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967). It can hardly be said that the race-conscious provisions imposed in the O&J and RAPO were "transparently invalid"

²⁷Decisions discussing the judiciary's parallel inherent authority to award equitable relief shed additional light on the scope of the civil contempt power. See *Roadway Express, Inc. v. Piper*; compare *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), with *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

²⁸ Although several statutory provisions including 42 U.S.C. § 2000h and of the Fed. R. Crim. P. 42 limit the exercise of criminal contempt power, there is no similar restraint on the exercise of civil contempt power.

²⁹ As demonstrated above, the sanctions fashioned are consistent with the traditional usages of civil contempt to coerce compliance and compensate losses. Apparently, the Solicitor misunderstands the purpose of civil contempt power: he suggests that the district court should have designed sanctions to penalize the "union's leaders," rather than innocent whites. Sol. Loc. 28 Br. at 31. As we discussed earlier, punishment is not the purpose of civil contempt. Here, the court properly fashioned a remedy to secure compliance with the O&J and RAPO and AAPO. Although as the Solicitor argues, imprisonment may have been a permissible coercive sanction, the district court had discretion to fashion sanctions other than imprisonment. See *Hutto v. Finney*, 437 U.S. at 691.

or that they had "only a frivolous pretense to validity," *id.*, for prior to the district court's imposition of contempt sanctions (as well as subsequently) every court of appeals had held that such remedies are authorized by Title VII. See n. 49, *infra* at 44. In fact, as shown below, a court has broad powers under Title VII to grant complete relief for identified discrimination and it may order relief that extends to individuals who are not the proven victims of discrimination.

Petitioners argue that 42 U.S.C. § 2000h precludes courts from awarding compensatory relief as a *civil* contempt sanction in contempt proceedings arising out of a Title VII action. Pet. Br. at 38. They press this contention despite their express recognition that section 2000h only governs "criminal contempt proceedings under the Act." Pet. Br. at 37. Moreover, section 2000h expressly provides that the section does not affect a court's power to impose civil contempt sanctions "to secure compliance with or prevent obstruction of. . . any lawful writ, process, order, rule, decree or command of the court. . . ." Civil contempt sanctions, whether coercive or compensatory, are designed "to secure compliance with or prevent obstruction of" court orders. See *McComb*, 336 U.S. at 193-95; *Leman* 284 U.S. at 455. The district court thus properly awarded compensatory as well as coercive relief as sanctions for petitioners' contemptuous conduct.

III. THE RACE-CONSCIOUS REMEDIES IMPOSED BY THE COURT BELOW COMPORT WITH TITLE VII AND THE FIFTH AMENDMENT

We have already shown that any effort to revisit the district court's decision fixing the goal is barred by the strong policy favoring repose in litigation. See Point I, *supra*. We have also shown that the goal is an integral part of the Fund order and that the Court's establishment of the goal, as well as the other race-conscious aspects of the Fund order, constitute an appropriate exercise of the district court's contempt power. See Point II, *supra*. The district court's legal predicate for imposition of the goal set forth in AAPO and the race-conscious aspects of the Fund order should not be reconsidered absent a clear showing that such

remedies when imposed as contempt sanctions are barred by Title VII or the fifth amendment of the Constitution.³⁰ See p. 27-28, *supra*. As shown below, far from barring such remedies, both Title VII and the Constitution authorize the use of race-conscious remedies in appropriate cases and the beneficiaries of such remedies may include other persons besides the identifiable victims of illegal discrimination.

A. The Race-conscious Remedies Ordered By The District Court Are Authorized Under Title VII

1. A remedy furthering the primary objective of Title VII of eradicating discrimination and its continuing effects is within the scope of section 706(g) of the Act

"[T]he scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365 (1977). Because race-conscious remedies such as those imposed below are necessary to achieve Title VII's primary purpose of eradicating discrimination and its effects, they are well within the scope of remedies authorized by Title VII.

The primary purpose of Congress in enacting Title VII in 1964 was prospectively to remedy the economic disadvantages resulting from race discrimination that blacks have suffered in our economy. *United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979) (citing 110 Cong. Rec. 6548 (1964) (remarks of Senator Humphrey)). Accord 29 C.F.R. § 1608.1b (1985). Congress was not, as petitioners and the Solicitor suggest, Pet. Br. at 17-18; Sol. Loc 93 Br. at 7-9, solely, or even primarily, concerned with the retrospective matter of remedying the injuries suffered by proven victims of discrimination. Thus, much of the congressional debate emphasized the high rate of unemployment among blacks,

³⁰ Moreover, the relief imposed by the district court was designed to remedy not only violations of Title VII but also violations of the NYC Code § Bl-7.0 (A. 321, 350-51). Petitioners have not challenged the permissibility of the goal and the Fund order under the New York City ordinance, and, indeed, there is no section in the ordinance that even arguably suggests that its broad remedial provisions are limited by a victim-specific principle. See appendix to this brief. The existence of an independent state ground for the remedies is an additional reason for affirming the judgment. See *Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

110 Cong. Rec. 6547, 7204 (1964) (remarks of Senator Clark), particularly in comparison with white unemployment rates. *Id.* at 6547 (remarks of Senator Humphrey).³¹ "Congress feared that the goals of the Civil Rights Act [of 1964] — the integration of blacks into the mainstream of American society — could not be achieved" unless the increasing rate of black unemployment was reversed. *Weber*, 443 U.S. at 202. Congress therefore passed Title VII "to open up employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 Cong. Rec. 6548 (remarks of Senator Humphrey), cited in *Weber*, 443 U.S. at 203.

This Court has repeatedly recognized that Congress' primary purpose in passing Title VII was "to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs*, 401 U.S. at 429-30; accord *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Fullilove v. Klutznick*, 448 U.S. 448, 499 (1980) (Powell, J., concurring). Put differently, Congress' main purpose was to eradicate discrimination and "the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle*, 422 at 417-418, 421 (citing *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)); accord *Dothard v. Rawlinson*, 433 U.S. 321, 328 (1977). This goal was "of the highest priority." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

When Congress amended Title VII in 1972, it again sought to eliminate the economic disparity between whites and minorities, a disparity dramatized by statistics showing that far more blacks than whites were unemployed, that blacks who were employed were far more likely to have low-paying jobs, and that the median income of white families was about 75% higher than that of minority families. S. Rep. No. 415, 92d Cong., 1st Sess.

³¹ Congress hoped that the passage of the Act would eliminate a "severe inequality in employment [that] is felt both on a personal and on the national level." See H. Rep. No. 914, Part 2, 88th Cong., 2d Sess. (additional views of McCulloch, *et al.*) reprinted in 1964 U.S. Code Cong. & Ad. News 2487, 2514. The national costs of this inequality were perceived as including additional expenses for "unemployment compensation, relief, disease and crime." *Id.* at 2515.

6 (1971), reprinted in Subcomm. on Labor of the Comm. on Labor & Pub. Welfare, 92d Cong. 2d Sess.: Legislative History of the Equal Employment Opportunity Act of 1972 Comm. Print (1972) at 410, 415, 417 ("1972 Leg. Hist."). Congress strengthened Title VII to eliminate that disparity. *Id.* at 417. See also H. Rep. No. 238, 92 Cong., 1st Sess. 3 (1971), 1972 Leg. Hist. at 64 ("minority groups are not obtaining their rightful place in our society"). Title VII was also enacted to make whole proven victims of discrimination for economic injuries they suffered as a result of discriminatory conduct. *Franks*, 424 U.S. at 763, 767 and n.27; *Albemarle*, 422 U.S. at 418-419; *Teamsters*, 431 U.S. at 364. This, however, was only "a secondary, fallback purpose." *Ford Motor Co. v. EEOC*, 458 U.S. at 230. Obviously, case-by-case adjudications aimed solely at compensating identified victims of discrimination will not result in the prompt removal of racial barriers or prevent future discrimination.

This Court has firmly held that a district court's remedial powers under the Act must be determined not just by its make whole purposes but by the primary purpose of "achiev[ing] equal employment opportunity and ... remov[ing] the barriers that have operated to favor white male employees over other employees." *Teamsters*, 431 U.S. at 364-65; *Franks*, 424 U.S. at 768 n.28, 770, 771; *Albemarle*, 422 U.S. at 417-21. A district court should therefore exercise its discretion under section 706(g) "to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." *Franks*, 424 U.S. at 770-71 (citing *Albemarle*, 422 U.S. at 421). Relief is to be denied "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* (emphasis added).

As demonstrated below, a holding that section 706(g), under the circumstances presented here, bars prospective, race-conscious remedial relief carefully designed to remedy the effects of decades of unrelenting discrimination would frustrate Title VII's primary purpose of bringing about equality of opportunity.

2. *Section 706(g) grants district courts broad equitable authority to impose goals and other race-conscious relief necessary to remedy proven discrimination*

The first part of section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides that:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and *order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate.* (emphasis added).

As reflected by its broad language, section 706(g) was intended to confer extremely broad equitable powers upon district courts to enable them to remedy unlawful discriminatory conduct and its effects.¹² *Teamsters*, 431 U.S. at 364; *Franks*, 424 U.S. at 771; *Albemarle*, 422 U.S. at 421. The federal courts have freely exercised the discretion conferred by section 706(g) to assure that employers found to be in violation of the Act eliminate their discriminatory practices and the effects of those practices. *Teamsters*, 431 U.S. at 361 n.47; see *Fullilove*, 448 U.S. at 510-13 (Powell, J., concurring).¹³

¹² Section 706(g), as amended in 1972, is fully applicable to this action. See *Bradley v. School Bd.*, 416 U.S. 696 (1974). The amendments to section 706 were inapplicable only to proceedings filed with the EEOC prior to the effective date of the amendment, not to suits such as this one filed by the Justice Department pursuant to section 707 of the 1964 Act, 42 U.S.C. § 2000e-6, Equal Employment Opportunity Act of 1972, Public Law No. 88-352 § 14; 1972 U.S. Code Cong. & Ad. News 2166 (section-by-section analysis § 10). See *Franks*, 424 U.S. at 764 n.21 (relying upon 1972 amendments and legislative history in determining appropriate remedy under section 706(g) for pre-1972 discrimination).

¹³ Contrary to the Solicitor's contention, Sol. Loc. 93 Br. at 8 n.5, the principles developed under section 10(c) of the NLRA, 29 U.S.C. § 160(c), "guide, but do not bind, courts tailoring remedies under Title VII." *Ford Motor Co. v. EEOC*, 458 U.S. at 226-28. See *Franks*, 424 U.S. at 769 n.29. But even under section 10(c), while punitive sanctions are barred, the Board may "remove[] or avoid[]" (footnote continued)

Petitioners and the Solicitor argue, however, that the last sentence of section 706(g) limits a district court's equitable powers under Title VII by depriving it of the authority to terminate the effects of discrimination unless the relief benefits only proven victims of discrimination. The contention does not withstand scrutiny.

a. *The plain language of section 706(g) demonstrates that race-conscious relief may benefit persons who are not proven victims of discrimination*

The last sentence of section 706(g) bars a court from ordering "admission . . . of an individual as a member of a union . . . if such individual was refused admission . . . for any reason other than discrimination on account of race" 42 U.S.C. 2000e-5(g) (emphasis added). The plain language of the sentence demonstrates that it is not a bar to race-conscious relief designed to remedy proven discrimination. First, a goal does not order the admission of "an individual," but instead directs that the union take steps to increase its overall minority membership. If Congress had intended to bar judicial relief benefitting unspecified members of a group, as opposed to relief running to specific individuals, it could plainly have done so. That is precisely the language Congress used in section 703(j) ("group or individual"). See n. 35 *infra* at 35. Second, the sentence only bars orders that grant relief to individuals who were "refused admission" to a union; under the orders in this case, eligibility for union membership under the prescribed goal is not dependent upon prior rejection by the union. Third, the sentence obviously addresses only the situation in which an individual was denied membership for a reason other than discrimination. "[T]he section merely prevents a court from ordering [a union to admit someone unqualified

the consequences of violations where those consequences are of a kind to thwart the purpose of the Act". *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961), (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938)). "The task of the NLRB in applying § 10(c) is 'to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.'" *Franks*, 424 U.S. at 769 citing *Local 60, United Bhd. of Carpenters*, 365 U.S. at 657 (Harlan, J., concurring). The remedial relief imposed below will further the primary purpose of Title VII and is "designed to recreate the conditions" that would have existed absent discrimination against minorities.

for membership] and has nothing to do with prospective class-wide relief." *Stotts*, 104 S. Ct. at 2609 (Blackmun, J., dissenting).³⁶

b. *The legislative history of Title VII supports the plain meaning construction of 706(g)*

The 1964 legislative history supports the "plain meaning" interpretation of the last sentence of § 706(g). It demonstrates that the sentence was added to ensure that the Act would not impair an employer's right to make personnel decisions on non-discriminatory grounds. See *Stotts*, 104 S. Ct. at 2608-09 (Blackmun, J., dissenting); *EEOC v. American Telephone & Telegraph*, 556 F.2d 167, 177-78 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). Section 707(e) of H.R. 7152, 88th Cong., 1st Sess. (1963), the predecessor to section 706(g), barred judicial relief to an individual "if such individual was ... refused employment or advancement or was suspended or discharged for cause." H.R. Rep. No. 914, 88th Cong., 1st Sess. ("H.R. Rep. No. 914") reprinted in *EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 2012 ("1964 Leg. Hist."). After it was amended to its current version, the sponsor, Representative Celler, stated that the purpose of both the original and amended versions was to clarify that an employer would not violate the statute by denying employment on grounds other than unlawful discrimination. 110 Cong. Rec. 2567 (1964) see H.R. Rep. No. 914, 1964 Leg. Hist. at 2029; see also 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); *id.* at 2568, 2570 (1964) (remarks of Rep. Gill).

When Congress amended Title VII in 1972, it was still of the view that the last sentence of section 706(g) barred only relief aimed at non-discriminatory employment decisions and not race-conscious relief to remedy systemic discrimination. Thus, the Conference committee report stated that "the provisions of existing

³⁶ The Solicitor professes that the sentence bars preferences to persons "not 'refused employment or ... suspended or discharged' as a result of discrimination." Sol. Loc. 93 Br. at 8-9, (quoting section 706(g)). The Solicitor General distorts the sentence. Its bar to preference is limited to persons who were "refused employment [or membership]" for a reason other than discrimination, and does not prevent relief benefitting persons who were not refused employment at all.

law prohibiting court ordered remedies based on any adverse action except unlawful employment practices under Title VII are retained." Conf. Rep. No. 899, 92d Cong., 2d Sess. 19 (1972), 1972 Leg. Hist. at 1839.³⁸

Virtually none of the legislative statements quoted by petitioners or by the Solicitor General lend any support to their claim that Congress intended in 1964 to prohibit temporary race-conscious relief designed to redress proven discrimination. Rather, consistent with the language and principles of sections 703(j) and 706(g), the statements quoted reflected Congress' intent that the Act not be interpreted to impose liability for a failure to adopt a quota or for racial imbalance without more,³⁹ to require employers to hire particular individuals who had not been subject to discrimination,³⁷ to authorize the EEOC or the courts to require employers to attain racial balance irrespective of past discrimination,³⁸ or to impose *permanent* quotas to remedy proven discrimination.³⁹ None of those situations is presented here.

³⁸ Section 703(j) does not bar a court from imposing race-conscious relief. That section provides that the Act shall not be interpreted to require an employer "to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of [a racial] imbalance [in the work force]". 42 U.S.C. 2000e-2(j). Under the section, employers cannot be required to institute a preferential system in order to avoid Title VII liability. *Weber*, 443 U.S. at 207 n.7. By its terms, the section bars only preferential treatment designed to remedy an imbalance, 110 Cong. Rec. 8921 (1964), 1964 Leg. Hist. at 3189-90 (remarks of Sen. Williams), not judicial relief premised upon a finding that the racial imbalance is attributable to past discrimination. If Congress had intended to bar race-conscious measures designed to remedy past systemic discrimination rather than to redress a racial imbalance, it would have said so. See *Weber*, 443 U.S. at 206.

³⁹ 110 Cong. Rec. 7207 (1964) (Mem. of Justice Dep't); *id.* at 1540, 15,876 (Rep. Lindsay); *id.* at 8921 (Sen. Williams); *id.* at 2558 (Rep. Goodell); *id.* at 5092, 11,848 (Sen. Humphrey); *id.* at 7213 (Clark - Case Interpretive Memorandum).

³⁷ 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); *id.* at 14,465 (Bipartisan Civ. Rights Newsletter); *id.* at 7214 (Clark - Case Interpretive Memorandum).

³⁸ 110 Cong. Rec. 14,465 (1964) (Bipartisan Civ. Rights Newsletter); *id.* at 1600 (Rep. Minish); *id.* at 1518 (remarks of Rep. Celler).

³⁹ 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); *id.* at 6566 (Mem. by Repub. members of H. Jud. Comm.); *id.* at 14,465 (Bipartisan Civ. Rights Newsletter).

where the courts have, in a proven instance of persistent discrimination, ordered prospective, temporary race-based remedies designed to correct past discrimination.⁴⁰

When Congress amended Title VII in 1972, it reaffirmed that race-conscious relief is within the arsenal of remedies authorized by section 706(g). In the course of strengthening the statute, Congress took several steps that touched directly upon section 706(g). The full significance of those steps, however, cannot be appreciated without an understanding of the backdrop to the amendments.

In 1965, President Johnson had issued Executive Order No. 11246, 30 Fed. Reg. 12,319 (1965), 42 U.S.C. § 2000e note. The Executive Order created the Office of Federal Contract Compliance and required federal contractors to engage in affirmative action to ensure equal opportunity. *Id.* Pursuant to the Executive Order, the Department of Labor in 1967 established the Philadelphia Plan. *Contractors Association v. Secretary of Labor*, 442 F.2d 159, 163 n.7 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). That Plan, as revised in 1969, required federal construction contractors subject to the Executive Order to make good faith efforts to attain numerical goals for the employment of minorities. *Id.* at 162-63. The requirement was extended to non-construction contractors in 1970. *Id.* The Plan was found consistent with Title VII by both the Attorney General, 42 Op. Atty. Gen. 405, 411 (1969), and the federal courts. *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Contractors*

⁴⁰ Indeed, in 1972, Senators Allott, Humphrey, Mansfield, Williams, Clark and Case all voted against proposed amendments to Title VII that would have barred the imposition of goals. 118 Cong. Rec. 1676, 4918 (1972), 1972 *Leg. Hist.* at 1074, 1716-17; see *infra* at 39 to 40. This is strong evidence that in 1964 these Senators did not believe that Title VII barred the use of temporary remedial goals.

Similarly, many of the members of the 1964 Congress who voted in favor of Title VII later opposed a rider that would have barred the use of goals under the Philadelphia Plan, see p. 37 n.41, *infra*, and emphasized that the use of programs such as the Philadelphia Plan was necessary if equal employment opportunity was to become a reality in the United States. See 115 Cong. Rec. 40,740-746 (1969) (remarks of Sens. Bayh, Javits, Griffin, and Scott); 115 Cong. Rec. 40,905, 40,908-909, 40,915, 40,917-919, 40,921 (1969) (remarks of Reps. Anderson, Bow, Ford, Fraser, Hawkins, McGregor, Reid and Ryan).

Association, 442 F.2d at 159. See generally *Regents of the University of California v. Bakke*, 438 U.S. 265, 354 n.28 (1978) (Brennan, Marshall, White and Blackmun, JJ.); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723 (1972).⁴¹

Both the Department of Justice and the EEOC, the two federal agencies charged with enforcement responsibilities under Title VII, maintained consistently that race-conscious remedies were permissible under Title VII. In appropriate cases they sought court orders, consent decrees, and conciliation agreements containing such provisions. See, e.g., *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); 118 Cong. Rec. 1665 (1972), 1972 *Leg. Hist.* at 1072 (press release summarizing consent decrees); 118 Cong. Rec. 1662-64, 1972 *Leg. Hist.* at 1045 (remarks of Sen. Ervin criticizing EEOC for "requiring employers to practice discrimination in reverse by . . . [use of] percentages, quotas, goals or ranges"). See also p. 43 n. 48, *infra*. Furthermore, the courts, acting under section 706(g), had, where necessary, imposed race-conscious remedies in order to redress proven discrimination. See, e.g., *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972) (applying Title VII analysis in action based on fourteenth amendment); *Ironworkers Local No. 86*, 443 F.2d 554; *United States v. Sheetmetal Workers Local 36*, 416 F.2d 123, 133 (8th Cir. 1969); *Local 53, International Association of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), *aff'd*, 294 F. Supp. 368 (E.D. La. 1968); *Thorn v. Richardson*, 4 F.E.P. Cases 299, 303 (W.D. Wash. 1971); *United States v. Local 638*, 337 F. Supp. 217 (S.D.N.Y. 1972) (preliminary injunction); *United States v. Sheet Metal Workers, Local 10*, 3 CCH Empl. Prac. Dec. ¶ 8,068 (D.N.J. 1970) (preliminary injunction); *NAACP v. Allen*, 340 F. Supp. 703, 705-06 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974) (fourteenth amendment); *Buckner v. Goodyear*

⁴¹ The Senate rejected a rider to a supplemental appropriations bill that would have barred programs like the Philadelphia Plan. See 115 Cong. Rec. 39,961 (1969) (remarks of Sen. Hruska). Although the Senate initially passed the rider, *id.* at 40,039, it was subsequently rejected by the House, *id.* at 40,921, and, upon reconsideration, by the Senate, *id.* at 40,749. See Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723 (1972).

Tire & Rubber Co., 339 F. Supp. 1108, 1125 (N.D. Ala. 1972), *aff'd without opinion*, 476 F.2d 1287 (5th Cir. 1973).⁴²

By the time Congress considered the 1972 amendments to Title VII, it was fully aware of the judicial decisions approving the use of goals or ratios, H.R. Rep. No. 238, 92d Cong., 1st Sess. 8 n.2 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 5 n.1 (1971); 118 Cong. Rec. 1662-76 (1972), 1972 *Leg. Hist.* 1046-1072, of the Attorney General's opinion upholding goals and timetables, and of the Justice Department's and EEOC's view that goals and ratios were permissible under Title VII. 118 Cong. Rec. 7166 (1972), 1972 *Leg. Hist.* at 1844; H.R. Rep. No. 238, 92nd Cong., 1st Sess. 16 (1971). Thus, had Congress simply left section 706(g) untouched when it amended Title VII in 1972, its refusal to amend the section would have constituted a ratification of those decisions. *Bob Jones University v. United States*, 461 U.S. 574, 599 (1983); *id.* at 607 (Powell, J., concurring); *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Congress did far more. First, in order "to give the courts wide discretion, as has generally been exercised under existing law, in fashioning the most complete relief possible," 118 Cong. Rec. 7168 (1972), it reaffirmed the breadth of section 706(g) and added language expanding its scope. The section was amended to authorize

such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay. . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (underscored language added in 1972).

Next, Congress expressly ratified decisions that had interpreted Title VII:

⁴² Contrary to *amicus curiae* Operating Engineers Local 542's contention, Op. Eng. Br. at p 14-15 n.10, the court in *Castro v. Beecher*, 334 F. Supp. 930 (D. Mass. 1971), *aff'd in part and rev'd in part*, 459 F.2d 725 (1st Cir. 1972), did not hold that Title VII barred race-conscious relief. *Id.* at 733. The district court did not doubt its authority to impose remedial goals. It merely declined to exercise its authority under the facts as they then appeared. 334 F. Supp. at 950; 459 F.2d at 737. Indeed, *Beecher* was not even a Title VII action. See 459 F.2d at 733.

In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

118 Cong. Rec. 7167 (1972), 1972 *Leg. Hist.* at 1844.⁴³ By this statement, Congress ratified the decisions authorizing goals. The ratification was fully applicable to decisions authorizing race-conscious relief under section 706(g), *cf. Stotts*, 104 S.Ct. at 2590 n.15, inasmuch as the amendment expanded rather than curtailed the scope of the section.

The Senate's rejection of two amendments offered by Senator Ervin further underscored its approval of goals as a means of remedying past discrimination. His first amendment would have barred any "department, agency or officer of the United States from requiring employers to practice discrimination in reverse". 118 Cong. Rec. 1662 (1972), 1972 *Leg. Hist.* at 1017. The second would have made section 703(j) applicable to the Executive Order and other statutes in addition to Title VII. 118 Cong. Rec. 4917 (1972), 1972 *Leg. Hist.* at 1681. Senators Javits and Williams, respectively the Republican and Democratic floor leaders in the Senate, argued against the amendments, 118 Cong. Rec. 1661-76, 4917-18. (1972), 1972 *Leg. Hist.* at 1046-48, 1070-73. In opposing them, Senator Javits highlighted three court decisions and two consent decrees that had expressly recognized the right of executive agencies and the courts to require race-conscious hiring. 118 Cong. Rec. 1665-1676, 1972 *Leg. Hist.* at 1048-1070. Senators Javits and Williams stated that the first amendment would have barred courts as well as executive agencies from imposing race-conscious goals.⁴⁴ 118 Cong. Rec. 1616, 1972 *Leg. Hist.*

⁴³ The next paragraph of the statement, 118 Cong. Rec. 7168 (1972), stressed that full make whole relief was within the scope of section 706(g); it did not state that such relief exhausted the relief available under the section.

⁴⁴ The amendment would not simply have deprived OFCC and the EEOC of the authority to require contractors to adopt goals, as contended by *amicus* Local 542 in its brief at 10. As Senator Javits argued, the amendment would have barred the Justice Department or the EEOC from seeking judicial goals
(footnote continued)

at 1046-47, 1072-73. The amendments were rejected, 118 Cong. Rec. 1676, 4918, 1972 *Leg. Hist.* at 1074, 1681, thereby demonstrating the Senate's belief that goals were a necessary means of remedying the effects of discrimination. *Stotts*, 104 S. Ct. 2576, 2609-10 (Blackmun, J., dissenting).⁴⁵

The House emphatically endorsed continued use of remedial goals and timetables under Title VII. In discussing the advisability of consolidating enforcement of Executive Order 11246 and Title VII in a single agency, the House Report stated that "affirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination." H.R. Rep. No. 238, 92d Sess. Cong., 1st Sess. 16 (1971), 1972 *Leg. Hist.* at 76. Given Congress' acute awareness that "affirmative action" under the Executive Order included the imposition of goals and timetables, *see, e.g.*, 117 Cong. Rec. at 31,965-67 (1971), 1972 *Leg. Hist.* at 210-11 (remarks of Rep. Green); 117 Cong. Rec. 31,965-66 (1971), 1972 *Leg. Hist.* at 212 (remarks of Rep. Hawkins), the Report is strong evidence of the House's approval of remedial goals under Title VII. Moreover, like the Senate, the House defeated a bill proposed by Congressman Dent that would have barred quotas or preferential treatment under the Executive Order. 117 Cong. Rec. 32,111 (1971), 1972 *Leg. Hist.* 255-56.

The Solicitor General and amicus curiae Operating Engineers Local 542 suggest that statements made by Representatives

under Title VII. 118 Cong. Rec. 1661, 1972 *Leg. Hist.* at 1046. Senator Ervin did not disagree with this characterization. *See also* 118 Cong. Rec. 1676, 1972 *Leg. Hist.* at 1072-73 (remarks of Sen. Williams).

⁴⁵ Amicus curiae Operating Engineers Local 542 speculates that a Senator may have voted against the first Ervin amendment simply because he did not want to bar the use of goals under the Executive Order, and that such a vote thus sheds no light on the Senate's intentions as to judicially imposed goals. Op. Eng. Br. at 14-15 n.10. The argument strains credulity. A Senator favoring the wholesale imposition of goals upon federal contractors (irrespective of whether the employers involved had engaged in discrimination) would hardly be opposed to remedial goals judicially imposed only upon proven discriminators. Thus, any Senator who voted against the bill was clearly in favor of judicially imposed goals. *See Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. at 759 n.189.

Erlenborn and Hawkins in 1972 demonstrate their (and the House's) understanding that Title VII prohibited the use of judicially imposed goals. Sol. Loc. 93 Br. at 14 n.11; Op. Eng. Br. at 10-13. Representatives Hawkins and Erlenborn, however, stated only that Title VII barred the establishment of quotas, 117 Cong. Rec. 31,965, 32,099-100 (1972), 1972 *Leg. Hist.* at 204, 261, not judicially imposed goals or goals established pursuant to the Executive Order. *Id.* The distinction between quotas and goals was made clear. 117 Cong. Rec. 31,965 (1971), 1972 *Leg. Hist.* at 212-13 (remarks of Rep. Hawkins) ("I do not agree that the Philadelphia plan imposes a quota").⁴⁶

In *Albemarle*, 422 U.S. 405, this Court held that Congress' rejection in 1971 of a narrowing amendment to the back pay provision of section 706(g), and the re-enactment of that provision without change, was, in light of Congress' knowledge of the courts of appeals' construction of the provision, a ratification of the courts of appeals' pre-1972 construction. *Id.* at 414 n.8, 420-21. Similarly, Congress' rejection of the anti-goal amendments and its expansion of section 706(g), with the knowledge that the courts and enforcement agencies had found goals permissible, unequivocally demonstrate that Congress approved the use of race-conscious remedies.⁴⁷

⁴⁶ The important distinction between quotas and goals had been debated before. For example, in 1969 Congress considered the "Fannin Amendment" which was intended to prohibit the Department of Labor from implementing the Philadelphia Plan. *See* 37 n.41, *supra*. Although the debate in both houses of Congress disclosed universal agreement that rigid, inflexible quotas should be eschewed, large majorities favored flexible, race-conscious goals. Congressman Bow explained the distinction as follows:

[T]he [Philadelphia] plan does not require, nor does it allow, discriminatory hiring practices as implied in the use of the word 'quota'. Instead the plan establishes a range of desirable hiring within which the contractor must set his goal.

115 Cong. Rec. 40,905 (1969). *See also id.* at 40,915 (Rep. McGregor); *id.* at 40,916 (Rep. Rhodes); *id.* at 40,917 (Rep. Hawkins); *id.* at 40,919 (Rep. Gerald Ford); *id.* at 40,743 (Sen. Percy).

⁴⁷ The Solicitor's argument based upon *INS v. Chadha*, 462 U.S. 919 (1983), misses the point. Only the Senate rejected the Ervin amendment, but *both* houses adopted existing case law interpreting Title VII; *both* expanded the breadth

(footnote continued)

Congress further indicated its approval of affirmative measures when it added Section 717, Pub. L. No. 88-352, Title VII, § 717, as added by Pub. L. No. 92-261, § 11, 86 Stat. 111 (1972), codified as amended at 42 U.S.C. § 2000e-16 (Supp. V. 1981). Section 717 requires, among other things, that each federal department and agency develop an affirmative action plan for employment. The Civil Service Commission "is to review, modify and approve each department or agency developed [plan] with full consideration of particular problems and employment opportunity needs of individual minority group populations within each geographic area." S. Rep. No. 415, 92 Cong., 1st Sess. 15 (1972). The purpose of section 717 was to make the federal government a "model employer." 118 Cong. Rec. 2298 (1972) (statement of Senator Williams). Requiring the federal government to institute affirmative measures is inconsistent with the notion that Congress intended to prohibit, or thought it had already prohibited, court-imposed affirmative remedies for proven violations of Title VII.

3. *The decisions of this Court and the courts of appeals support the use of narrowly tailored race-conscious remedies to redress the effects of past discrimination*

The Court's reasoning in *Weber*, 443 U.S. at 201-05, upholding voluntary, affirmative efforts to eliminate "conspicuous racial imbalance in traditionally segregated job categories", *id.* at 209, is equally applicable here. In *Weber*, the Court held that the goals of eradicating discrimination and integrating blacks into the mainstream of American society would be frustrated by an interpretation of section 703(a) and (d) of Title VII that prohibited voluntary efforts to correct racial imbalance. Such remedies are permissible so long as they are designed to remedy longstanding discrimination and do not unnecessarily trammel the rights of white workers. *Id.* at 208. It follows that a rule prohibiting similar judicial relief against employers or unions which fails to correct

of section 706(g); and in the face of widespread controversy about, and judicial acceptance of, goals, *both* refused to bar their use.

Moreover, the Solicitor's argument flies in the face of cases holding that the interpretation of a statute may be based upon subsequent Congressional inaction. *E.g.*, *Bob Jones University*, 461 U.S. at 599-601.

an imbalance caused by their own discriminatory conduct would also frustrate the purposes of the Act. As demonstrated in section III (A)(2), at 32-42 *supra*, neither section 706(g) nor section 703(j) bars such judicial relief to redress past discrimination. Accordingly, "an interpretation of the Act that forbade all race-conscious remedial relief would bring about an end completely at variance with the purposes of the statute and must be rejected." *Id.* at 202.*

* The Department of Justice and the EEOC, the federal agencies responsible for the enforcement of Title VII, 42 U.S.C. § 2000e-4,5,6,8,12 and 14 (1981), see Reorganization Plan No. 1 of 1978, E.O. 12067, 43 Fed. Reg. 19,807 (1978), have throughout the two decades following passage of the Act maintained that goals and other race-conscious means of remedying past discrimination are consistent with Title VII. *E.g.*, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.17 (1985); Policy Statement on Affirmative Action Programs for State and Local Government Agencies, 41 Fed. Reg. 38,814 (1976) (issued by Equal Employment Opportunity Coordinating Council, composed of heads of EEOC, the Department of Justice, the Department of Labor, the Civil Service Commission and the Commission on Civil Rights). See 29 C.F.R. § 1607.17 (1982); Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as amended, 29 C.F.R. § 1608.4(c) (1985); 42 Op. Atty. Gen. 37 (1969); see also 28 C.F.R. § 42.203(i,j) (1985).

The position previously taken by the United States and the EEOC in this case is consistent with this longstanding policy of both enforcement agencies. Between June 1971 and July 1985, when the Solicitor General filed his response to the petition for a writ of certiorari, *all* of the plaintiffs sought and supported broad remedial court orders which include numerical goals, implementing ratios, and timetables (JA. 372, 275-83, 157-61). Thus for example, in the complaint filed in this action in 1971, former Attorney General Mitchell sought "selection of sufficient apprentices from among qualified nonwhite applicants to overcome the effects of past discrimination" (JA. 374). Following the trial in 1975, the United States Attorney for the Southern District of New York on behalf of the EEOC argued:

In granting relief under Title VII Courts have wide discretion to fashion the appropriate remedies and broad powers to grant affirmative relief. 42 U.S.C. §§ 2000e-5(g), 2000e-6(a).

...

[T]his Court should establish a goal of no less than 30 percent nonwhite membership in Local 28.

...

(footnote continued)

This Court has expressed approval of race-conscious, non-victim specific remedies intended to remedy proven employment discrimination. *Fullilove*, 448 U.S. at 510-11 (Powell, J., concurring); *Bakke*, 438 U.S. at 353 n.28 (1978) (Brennan, White, Marshall and Blackmun, JJ.); *id.* at 301-02 (Powell, J.). Similarly, the courts of appeals have *unanimously* approved the use of race-conscious remedies under section 706(g).⁴⁰

In *Albemarle*, 422 U.S. 405, and *Franks*, 424 U.S. 747, the Court found that awards of back pay and retroactive seniority

It is clear that "a reasonable preference in favor of minority persons to remedy past discriminatory injustices is permissible."

(JA. 276-77). As recently as July, 1984, the EEOC urged the court of appeals that "the language and legislative history of 706(g) support the Commission's position that carefully tailored prospective race-conscious measures are permissible Title VII remedies" (JA. 8).

The longstanding views of agencies charged with the statute's administration are entitled to great weight. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). As this case indicates, the EEOC has of late shifted ground totally. Its radical shift, so removed in time from the passage of the Act, counsels, at a minimum, that little deference is due to its current view of these matters. Indeed, we submit that deference should continue to be given to the EEOC's unwavering previous position in the absence of either statutory or constitutional erosion of the basis for that position.

⁴⁰ See, e.g., *Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1026-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Ass'n Against Discrim. in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 279-84 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 631 (2d Cir. 1974); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *United States v. Int'l Union of Elevator Constructors, Local Union No. 5*, 538 F.2d 1012, 1017-20, (3d Cir. 1976); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 498-99 (4th Cir. 1981); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (*en banc*); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 356 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 696-97 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *United States v. City of Chicago*, 549 F.2d 415, 436 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 380 (8th Cir. 1973); *Davis v. County of Los Angeles*, 566 F.2d 1334, 1342-44 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 943-45 (10th Cir. 1979); *Paradise v. Prescott*, 767 F.2d 1514, 1527 (11th Cir. 1985); *Thompson v. Sawyer*, 678 F.2d 257, 293-95 (D.C. Cir. 1982).

were necessary to motivate employers to shun practices of dubious legality and to "endeavor to eliminate, at long-last, the vestiges of an unfortunate and ignominious page in this country's history." *Albemarle*, 422 U.S. at 418; see *Franks*, 424 U.S. at 764. Similarly, a rule limiting relief to identifiable victims would serve as a disincentive to employers to take steps to eliminate their discriminatory practices and the effects of those practices. It would create an incentive to ensuring that victims of discrimination were *not* identifiable and would, as the facts of this case illustrate, benefit the most blatant of discriminators. Petitioners could avoid being subjected to any meaningful remedy by the simple expedient of ensuring that their victims could not be identified. They could maintain a nearly all white work force by preserving their discriminatory reputation, thereby discouraging minority applications, see *Teamsters*, 431 U.S. at 365-66, or as petitioners did here, by discouraging minority applicants who called the union or went in person to obtain applications.

The impact of petitioners' discriminatory practices has fallen and will fall upon a whole range of victims whose identity will never be discovered or proven: individuals whose applications were discarded; others who were deterred from applying by the union's reputation; many who never knew about the union because its reputation prevented it from being a subject of conversation in minority communities; some who were unlawfully denied membership but either did not know about this lawsuit or are no longer in a position to join the union; relatives and friends of the foregoing groups, who were deprived of support, or of an opportunity to be informally trained for their own career in sheet metal work. See Spiegelman, *Court-Ordered Hiring Quotas After Stotts*, 20 Harv. C.R.-C.L. L. Rev. 339, 369-70 (1985) ("Spiegelman"). Unlike the identities of these individuals, however, the cause of all their injuries has been proven: petitioners' longstanding resistance to fair employment laws and judicial mandates enjoining discrimination. That conduct has established continuing barriers to equal employment opportunity in New York City's sheet metal industry. Consequently,

the [district] court has not merely the power but the duty to render a decree which will so far as is possible eliminate

the discriminatory effects of [such conduct] as well as bar discrimination in the future.

Albemarle, 422 U.S. at 418 (citing *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

Petitioners and the Solicitor misconstrue *Albemarle*, *Franks* and *Teamsters*. These cases concern the retrospective, "make-whole" component of Title VII. To the extent that they touched on the prospective component of the Act, those cases disclose approval of the wide discretion Congress accorded the courts to address identified discrimination. Such prospective remedies need not be restricted to the proven victims of discrimination. *Albemarle* involved only the right of specific victims of racial discrimination to an award of backpay.⁹⁰ Similarly *Franks* concerned the extent to which retroactive seniority may be awarded "identifiable applicants who were denied employment because of race."⁹¹ 424 U.S. at 750. Its holding was a straightforward application of the make-whole retrospective feature of section 706(g) of the Act, which bars judicial relief for an individual refused employment "for any reason other than discrimination" See pp. 32-42, *supra*. Granting seniority in *Franks*, 424 U.S. 747, to applicants who had been rejected for non-discriminatory reasons would have violated this provision. In contrast, the goal does "not compel [petitioners] to [grant membership to] any particular

⁹⁰ The issue before the Court in *Albemarle* was narrowly framed to address only the claims of identified victims to an award:

When employees or applicants for employment have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice, what standards should a federal district court follow in deciding whether to award or deny backpay?

422 U.S. at 408.

⁹¹ The Court defined the issue before it as follows:

This case presents the question of whether identifiable applicants who were denied employment because of race . . . in violation of Title VII . . . may be awarded seniority status retroactive to the dates of their employment.

424 U.S. at 750.

applicants and [does] not require [that petitioners grant membership] to individuals who otherwise would have been rejected or discharged on non-discriminatory grounds." *United States v. City of Buffalo*, No. 85-6212, slip. op. at 9 (2d Cir. December 19, 1985).⁹²

In *Teamsters*, the Court held that individual non-applicants could not be awarded seniority unless they could demonstrate that they would have applied but for the union's discriminatory reputation. 431 U.S. at 363. As in *Franks*, the Court's holding was an application of the principle that a court may not award make-whole relief to a particular individual who had not been subjected to actual discrimination.

In *Teamsters*, the Court touched on the prospective component of the Act. It noted that

[t]he federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of § 707(a) eliminate their discriminatory practices and the effects

⁹² The Court also held in *Franks* that relief that will further a central purpose of the Act is not to be denied because innocent persons will be adversely affected by the relief. *Franks*, 424 U.S. at 777-78. "A sharing of the burden of past discrimination is presumptively necessary" and "is entirely consistent with any fair characterization of equity jurisdiction." *Id.* at 777. Although the principle was invoked in *Franks* in connection with the make-whole purpose of the Act, it applies *a fortiori* with respect to the Act's "primary" purpose. See *Franks*, 424 U.S. at 783 n.2 (Powell, J.)

Justice Powell's partial dissent in *Franks* was based on his view that the majority opinion failed to accord district courts adequate flexibility to award or decline to award retroactive competitive seniority to identified victims of discrimination. See 424 U.S. at 788. Justice Powell acknowledged that such an award advances the "make-whole" purpose, but maintained that since such a grant "causes only a rearrangement of employees along the seniority ladder without any resulting increase in cost to the employer, Title VII's 'primary objective' of eradicating discrimination is not served at all." *Id.* At the same time, the seniority award adversely affects the seniority expectations of innocent third parties, expectations that were accorded special recognition by Congress. See *id.* at 791. In contrast, the relief ordered below furthers the primary objectives of the Act by removing the barriers to equal employment opportunity caused by the union's past and present discriminatory practices, broadening the pool of workers available for employment in the sheet metal industry and ensuring that future job opportunities are more equitably shared.

therefrom . . . In this case prospective relief was incorporated in the parties' consent decree. See n.4, *supra*.

431 U.S. at 361 n.47. The footnote to which the Court referred reveals that the "company obligated itself to hire one Negro or Spanish-surnamed person for every white person hired." *Id.* at 330 n.4.

The only issue in *Stotts*, 104 S. Ct. 2576, was whether retroactive seniority could be awarded to readily identifiable individuals who had not been proven to be victims of discrimination. In fact, as the EEOC aptly commented to the court of appeals, "[s]ince the [Supreme] Court's entire discussion [of § 706(g) in *Stotts*] is carefully limited to the improper award of 'make-whole' relief, it is clear that the Court consciously avoided addressing the broader question of the availability of *prospective* race conscious relief" (emphasis in the original) (JA. 7). Consistent with *Teamsters* and *Franks*, this Court held that under the policy embodied in section 706(g), retroactive seniority could not be awarded to specific individuals who were not proven victims of discrimination.

4. *The race-conscious remedies imposed by the court below further the purposes of Title VII and are fully supported by the record*

Title VII permits a court to impose race-conscious relief that is not restricted to the proven victims of discrimination, although this Court's decisions counsel that orders which include such remedies should not be entered lightly or routinely. See *Weber*, 443 U.S. 193; *Fullilove*, 448 U.S. 448. Of course, a court may not impose a remedy — any remedy — over the objection of the defendant except upon a finding of unlawful discrimination. See *Swann*, 402 U.S. at 28; *Milliken*, 418 U.S. at 744-45. The remedy imposed should extend no further than is reasonably necessary to cure the identified discrimination. See *Fullilove*, 448 U.S. at 483; *Milliken*, 433 U.S. at 280-81. Where the remedy imposed contains race-conscious features, it should be limited and properly tailored to cure the effects of prior discrimination. See *Fullilove*, 448 at 484. In this regard, a district court should consider factors such as "(i) the efficacy of alternative remedies . . . (ii) the planned duration of the remedy. . . (iii) the relationship between the percentage of minority workers to be employed and

percentage of minority group members in the relevant population or work force . . . and (iv) the availability of waiver provisions if the hiring plan could not be met." *Fullilove*, 448 U.S. at 510-11 (Powell, J., concurring). The district court should also be mindful of the effect of the order on third parties and its order should not "unnecessarily trammel" the interests of white workers. *Weber*, 443 U.S. at 208; accord *Fullilove*, 448 U.S. at 514 (Powell, J., concurring).

The relief imposed by the district court in 1982 and 1983 encompasses all of these considerations. It was necessitated by decades of discrimination that numerous previous judicial and administrative mandates had failed to cure.

The evidence adduced in the contempt proceedings dramatized the continued need for a goal, as well as for the additional race-conscious relief contained in the Fund order.⁵³ Twenty years after the state court proceedings, twelve years after the Justice Department had brought suit, and eight years after the district court had enjoined the union from continuing its discriminatory practices, petitioners were still deliberately impeding the entry of minorities into Local 28. Indeed, one would be hard-pressed to find more compelling circumstances favoring imposition of race-conscious remedies than the situation in this case.

Petitioner's discriminatory practices and policies, in the face of federal and state laws and injunctions barring such discrimination, make it unmistakably clear that something more is needed to prevent future discrimination and to assure integration of the union than injunctive remedies that merely track statutory prohibitions, see *Morrow v. Chrysler*, 491 F.2d 1053, 1055 (5th Cir.) (*en banc*), *cert. denied*, 419 U.S. 895 (1974); *Morrow v. Dillard*, 580 F.2d 1284, 1295-96 (5th Cir. 1978); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974), and that require the union to conduct vigorous recruiting and publicity campaigns. The plain lesson which the courts below have drawn from petitioners' past conduct is that,

⁵³ Likewise, the record before the district court in 1975 demonstrated that an order which did not include race-conscious provisions would not be effective. The court found that "the imposition of a remedial racial goal in conjunction with an admission preference in favor of nonwhites is essential to place defendants in a position of compliance . . ." (A. 352).

at least for now, the union simply cannot be trusted to make decisions in a non-discriminatory fashion or to comply with injunctions directing it to reach out to minority communities for new members. Bias-free admission decisions can be assured only by a directive requiring the union to make regular and substantial progress toward reaching a level of minority membership that parallels minority representation in the relevant work force.

Employment opportunities in the sheet metal industry in the New York City metropolitan area are to a great degree restricted to members of Local 28⁴⁴ (A. 322-24, 326). Thus, equality of employment opportunity in the sheet metal industry in New York City cannot be achieved until the union "removes the barriers [to present job opportunities] that have operated in the past to favor an identifiable group of white employees." *Griggs v. Duke Power Co.*, 401 U.S. at 429-30. Essential to such an objective is increasing minority membership in the union to the level it would have reached absent past discriminatory practices.

Such thoroughgoing relief is also necessary to dispel the union's discriminatory reputation, earned over decades of unlawful discrimination (A. 151, 350). Relief must assure potential minority applicants that submission of an application will not be an act of futility. *Association Against Discrimination v. City of Bridgeport*, 479 F. Supp. 101 (D. Conn. 1979), *on remand from* 594 F.2d 306, 311 n.13 (2d Cir. 1979); *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971) (*en banc*) *cert. denied*, 406 U.S. 950 (1972); *see Bridgeport Guardians, Inc. v. Civil Service Commission*, 354 F. Supp. 778, 797 (D. Conn.), *aff'd in part, rev'd in part*, 482 F.2d 133 (2d Cir. 1973). Only by changing "the outward and visible signs of yesterday's racial distinctions" can the union's "reputation as an all-white organization," *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974), be overcome so that a recruitment program can operate without being impaired by the lingering effects of the union's discriminatory past. *See Mims v. Wilson*, 514 F.2d 106 (5th Cir. 1975); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974); *Carter v. Gallagher*, 452 F.2d at 315. Expanding

⁴⁴ While petitioners maintain that Local 28 is a "small union," Pet. Br. at 3, it is the largest labor organization in the construction sheet metal trade in the New York metropolitan area. Its members are employed on virtually every major construction involving sheet metal in New York City (JA. 406).

the minority work force also ensures that minority members will learn of job opportunities through word-of-mouth, the major means of job recruitment, on a more equal basis.⁴⁵ *See Blumrosen, The Duty of Fair Recruitment*, 22 Rutgers L. Rev. 465, 490 (1968).

Because of Local 28's past discrimination, minority persons who become members of the union are compelled to work in environments that are virtually all white. Such employees are frequently faced with an indifferent if not a hostile workplace and with a union whose membership (and leadership) are unsympathetic to claims of discriminatory treatment (JA. 405). These effects of past discrimination will not significantly abate, therefore, unless the union is directed to accept a significant number of additional minority members (A. 351). *See Taylor v. Jones*, 489 F. Supp. 498 (E.D. Ark. 1980), *aff'd*, 683 F.2d 1193 (8th Cir. 1981); *see Spiegelman*, at 364-84.

In its 1964 decision, the New York State Commission For Human Rights likened Local 28 to "the medieval guilds" (JA. 402). In guild-like fashion, union members maintain informal, mutual support systems to help each other find and retain employment. *See* n. 55, *supra*. Because of the Local's tradition of racial exclusion and its longstanding commitment to preferring the relatives and friends of its members, minority apprentices are at a decided disadvantage when seeking or keeping employment. As noted above, p. 23, *supra*, the provisions of the Fund address this reality.

The remedial provisions here under review were carefully arrived at and contain great flexibility to deal with changing circumstances. In imposing its order, the district court fixed the 29.23% goal to reflect the representation of minority members between the ages of 18-24 in the relevant labor market⁴⁶ (A. 119-123). The O&J, AAPO and the Fund order are all temporary.

⁴⁵ As petitioners note, "referral and hiring was done informally through word of mouth and contacts with other members, apprentices and contractors" (Pet. Br. at 4 n.5).

⁴⁶ Likewise, the district court exhibited great care in fixing the goal in 1975 (A. 333-54). In both instances the court of appeals affirmed the findings of the district court (A. 168, 33).

They will expire, and court supervision of the admission process will terminate, when the proportion of minority union members approximates the proportion of minorities in the relevant labor market (A. 54-55).

The goal only minimally impairs the rights of non-minority union members and applicants, if at all, because the court has insisted that the Local fully utilize the apprenticeship program, thereby opening more opportunities for all. *See Weber*, 443 U.S. at 280; *Fullilove*, 448 U.S. at 514-15 (Powell, J.). As modified by the court of appeals, AAPO does not require indenture of any specific ratio of minority apprentices. No incumbent union member or readily identifiable applicant will be displaced from the union or from any job. No unqualified minority persons will become members of the union or obtain job employment opportunities by virtue of the district court's order. The goal merely ensures that competition for sheet metal jobs will not continue to be limited to members of a pool artificially restricted by the union's past discriminatory acts (A. 54).

The Fund order and AAPO do not impose any burden on white union members or applicants, as AAPO expressly provides that the union may provide precisely the same services to whites (A-76, 118). Many provisions of the Fund order, particularly those which provide for financial assistance to employers that cannot otherwise meet the 1:4 apprentice to journeyman requirement of AAPO, and for incentive or matching funds to attract additional funding for job training programs, are entirely race-neutral and operate to the benefit of whites and non-white apprentices alike. Similarly, the 1:4 apprentice-to-journeyman ratio is itself not race-conscious and does not unnecessarily trammel the interests of white journeymen. Adherence to the ratio, which is based upon the standard in the industry (A. 34, 66), will simply ensure that a reasonable share of present job opportunities will be afforded to an apprentice pool untainted by past discrimination. Moreover, given that the primary route into the union (and to journeyman status) is through the apprenticeship program, the 1:4 ratio will expedite the transition from a union whose journeyman ranks were formed by discrimination to one that is truly integrated and free from the effects of past discrimination (A. 66-67).

The goal's flexibility is evidenced by the court's two prior modifications of the goal, see pp. 7, 11, *supra*, and its express refusal to hold the union in contempt for not meeting the goal in 1982. However, the goal is meaningful. The district court has repeatedly admonished that the Local is under an obligation to assure "regular and substantial progress" (A. 305, 183, 54) every year toward achieving the goal. Through imposition of fines, the court hoped that the Local "will conclude that it is too expensive to continue to violate the court's order and will make real and substantial effort to bring an end to the obvious and pernicious discriminatory practices that permeate this trade" (A. 112).

This Court stated in *Weber*:

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long, 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

443 U.S. at 204. It would be even more ironic if Title VII were held to bar one of its major objectives: remedying traditional patterns of segregation caused by decades of purposeful, egregious discrimination.

B. The Remedies Imposed Comport with the Equal Protection Component of The Due Process Clause of The Fifth Amendment

Nothing in the equal protection component of the Fifth Amendment's due process clause deprives the district court of authority to impose the remedies it ordered in this case. Racial classifications imposed to eliminate the continuing effects of unlawful discrimination, and to bar similar discrimination in the future, are constitutional. Thus, the Court has ruled that a medical school may properly consider the race of its applicants, at least when a proper body has found that discrimination has impaired the ability of minority group members to compete for

entry into the program. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J.); *id.* at 355 (Brennan, White, Marshall, and Blackmun, JJ.). Similarly, in school desegregation cases, the Court has upheld the assignment of students and faculty on the basis of race, when necessary to eliminate "root and branch" the continuing effects of racial discrimination. *Swann*, 402 U.S. at 18-21; *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971); *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969); *see also United Jewish Organization v. Carey*, 430 U.S. 144, 159-62 (1977). And in its most recent pronouncement on the constitutionality of race-conscious remedies, this Court upheld a federal law requiring that at least ten percent of federal funds for public works projects be awarded to construction companies owned or controlled by members of minority groups. *Fullilove*, 448 U.S. 448 (Burger, C.J., joined by White and Powell, JJ.); *id.* at 495 (Powell, J.); *id.* at 517 (Marshall, J., joined by Brennan and Blackmun, JJ.).⁵⁴

Contrary to the contentions of the Solicitor and petitioners, this Court has upheld relief benefitting members of groups that have suffered discrimination, irrespective of whether the individuals receiving the benefit had themselves been victims of that discrimination. Thus, in *Fullilove*, the Court upheld the ten percent set-aside although minority contractors were eligible under the set-aside whether or not they could make an individualized showing that they suffered from the continuing effects of discrimination. *See Fullilove*, 448 U.S. at 520 n.4 (Marshall, J., joined by Brennan and Blackmun); *id.* at 530 n.12 (Stewart, J., dissenting); *id.* at 540-41 and 541 n.13 (Stevens, J., dissenting); *see also* 448 U.S. at 479-80 (Burger, C.J.). And under *Bakke*, 438 U.S. at 265, a candidate's race can be considered

⁵⁴ Remedial decrees incorporating racial classifications may be justified by statutory as well as constitutional violations. *Fullilove*, 448 U.S. at 483 (Burger, J., joined by White and Powell, JJ.), citing *Franks*, 424 U.S. 747 (1976), *Teamsters*, 431 U.S. 324 (1977), and *Albermarle*, 422 U.S. 405. *Accord United Jewish Organization*, 430 U.S. at 147-165 (White, J., joined by Brennan, Blackmun and Stevens, JJ.).

whether or not he had himself suffered discrimination that impaired his ability to compete for admission to the school. *Id.* at 366 (Brennan, White, Blackmun, Marshall, JJ.); *id.* at 315-320 (Powell, J.).

Similarly, the Court has upheld race-conscious relief designed to remedy proven discrimination even when those adversely affected by the remedy have not been responsible for, or the beneficiaries of, acts of discrimination. Thus, in *Fullilove*, the set-aside was upheld despite the recognition that such "[r]ace conscious remedies, popularly referred to as affirmative-action programs, almost invariably affect some innocent persons." *Fullilove*, 448 U.S. at 506-07 n.8, 514-517 (Powell, J., concurring). "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.* at 484 (Burger, C.J., joined by White and Powell, JJ.) (citing *Franks*, 424 U.S. at 777, *Albermarle*, 422 U.S. at 405, and *United Jewish Organization*, 430 U.S. at 144); *accord Fullilove*, 448 U.S. at 518 (Marshall, J.); *Bakke*, 438 U.S. at 325; *United Jewish Organization*, 430 U.S. at 177 n.5 (Brennan, J., concurring). *See also Franks*, 442 U.S. at 774.

The specific race-conscious measures imposed below are constitutional. They are remedies designed to serve important governmental objectives and are substantially related to achievement of those objectives. *Bakke*, 438 U.S. at 359 (Brennan, White, Marshall and Blackmun, JJ.); *see also Fullilove*, 448 U.S. at 519 (Marshall, J., joined by Brennan and Blackman, JJ.). They are also narrowly drawn to further a compelling governmental interest.⁵⁵ *Fullilove*, 448 U.S. at 496, 498 (Powell, J.); *cf. Bakke*, 438 U.S. at 305 (Powell, J.). Both the adjusted goal of 29.23 percent, and the Fund order were designed to overcome the effects of identified discrimination, and to assure that the union would not continue to discriminate. This Court has held those purposes to be legitimate, substantial and compelling. *Bob Jones University*, 461

⁵⁵ The Court has not required that remedial plans be limited "to the least restrictive means of implementation . . . [T]he choice of remedies to redress racial discrimination is a 'balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Fullilove*, 448 U.S. at 508 (Powell J., concurring) (citing *Franks*, 424 U.S. at 794 (Powell, J.)).

U.S. at 594-95 (1983); *Fullilove*, 448 U.S. at 496, 497 (Powell, J.); *id.* at 475-76 (Burger, C.J., joined by White and Powell, JJ.); *id.* at 542-43 (Stevens, J.); *Bakke*, 438 U.S. at 407 (Powell, J.); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

The means employed by the district court were narrowly drawn to redress the effects of the union's long history of discrimination and are substantially related to achievement of that goal. This Court has often upheld the use of numerical race-based ratios to fashion relief for discriminatory practices. *Fullilove*, 448 U.S. at 453 (Burger C.J., joined by White and Powell, JJ., concurring); *id.* at 482 (Powell, J., concurring);³⁶ *Id.* at 517 (Marshall, J. joined by Brennan and Blackman, JJ.); *United Jewish Organization*, 430 U.S. at 147; *Swann*, 402 U.S. at 18 21; *Bakke*, 438 U.S. at 269 (Powell, J.). As demonstrated in Point IIIA, the remedies imposed by the district court are flexible, and the burden imposed upon whites by the race-conscious remedies is the minimum necessary to redress the exclusion of minorities from Local 28 and the JAC. The remedies are thus consistent with the governing principles formulated by this court. See *Fullilove*, 448 U.S. at 448; *Bakke*, 438 U.S. at 269.³⁷

³⁶ The reasoning by which this Court sustained Congress' race-conscious remedy in *Fullilove* is fully applicable to judicial race-conscious remedies imposed to redress proven discrimination. Like the *Fullilove* set-aside, judicially imposed goals have been authorized by Congress. Point IIIA, *supra*. Moreover, a district court's authority to eliminate the effects of past discrimination is as broad as Congress' authority. *Fullilove*, 448 U.S. at 510-14 (Powell, J.); *North Carolina State Bd. of Ed. v. Swann*, 402 U.S. 43, 46 (1971). Indeed, the need for race-conscious remedies is even greater here inasmuch as the remedy was imposed only against a specific union that had been expressly found to have engaged in a long history of race discrimination. In *Fullilove*, the set-aside benefitted contractors who had not been subjected to discrimination and adversely affected many contractors that had never discriminated.

³⁷ Title VII is not a bill of attainder, as the Act does not apply to "named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial. . . ." *United States v. Lovett*, 328 U.S. 303, 315 (1946). Section 706(g) does not single out any specific class of persons who, because of past activities, are "ineluctably designated" for punishment. 104 S.Ct. 3348, 3353 (1984), (citing *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 87 (1961)); see *United States*

(footnote continued)

IV. THE CREATION OF THE OFFICE OF ADMINISTRATOR WAS PROPER

Local 28 objects to the office of the administrator, claiming that, in light of what it characterizes as its "established record of adherence to [court] orders," the creation of the office was not the least intrusive remedy, and that the administrator is a receiver supplanting the Local's right to self-government. Pet. Br. at 42. Local 28 also argues that the powers delegated to the administrator resulted in an abdication of judicial powers. We have shown that these claims are untimely, see Point I, *supra*. In addition, these belated arguments fail on the merits.³⁸

The Local's argument that there "was no basis" for appointing the administrator in 1975 because "[b]y 1975, Local 28 had an established record of adherence to orders," Pet. Br. at 42, is belied by the repeated findings of the courts below. See pp. 3, and 5-6, *supra*. Indeed, the Local's record of "past recalcitrance" (A. 220), "bad faith" (A. 214) and "foot-dragging" (A. 24) over

v. Lovett, 328 U.S. at 322-23 (Frankfurter, J., concurring). Moreover, race-conscious remedies do not punish any person, but rather confer a benefit on members of a class judicially determined to have been excluded from employment opportunities by practices that violate Title VII. "That burdens are placed on citizens by federal authority does not make those burdens punishment." *Selective Serv. Sys. v. Minn. Public Int. Research Group*, 104 S. Ct. at 3355 (citing *Nixon v. Admin. of General Services*, 433 U.S. 425, 470 (1977)). Here, no person is permanently deprived of the opportunity to engage in the vocation of his choice, see *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867), and thus, section 706(g) "is in no sense punitive; it authorizes no punishment in any normal or general acceptance of that familiar term." *Selective Serv. Sys.*, 104 S. Ct. at 3360 (Powell, J., concurring).

³⁸ The court of appeals rejected petitioners' attempt to limit the powers of the administrator to adjudicating disputes under AAAP, see pp. 11 n.13, 13, *supra*. Sol. Loc. 28 Br. at 22, as both untimely and meritless. It stated that:

Local 28's complaint that the obligations imposed by AAAP will interfere with its right to self government need not detain us. . . . We have rejected this contention on previous appeals [citation omitted], and we reiterate that the government of Local 28 will be returned to its members as soon as it ends its unlawful discrimination against nonwhites. Until that time, the government of Local 28 must remain subject to the supervision of the district court and the administrator.

(A. 31).

the past twenty years demonstrates the need for continuous oversight of the "process of its legally required integration," *supra* at 3. *Accord Albermarle*, 422 U.S. at 418; see Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 835 (1978) ("Special Project"); Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 Cornell L. Rev. 53 (1974) ("Harris").

Courts have often upheld the appointment of an administrator or special master to oversee the implementation of judgments in complex civil rights cases where the defendant has failed to comply with court orders requiring changes in existing practices and conditions. See *New York State Association for Retarded Children v. Carey*, 706 F.2d 956, 962-63 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Ruiz v. Estelle*, 679 F.2d 1115, 1159-63 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Gary W. v. State of Louisiana*, 601 F.2d 240, 244-45 (5th Cir. 1979). Moreover, the special difficulties inherent in monitoring compliance with a decree aimed at the construction industry particularly justify the office of the administrator. Harris, 60 Cornell L. Rev. at 62-63. See cases cited in Pet. Br. at 44 n. 32.

The Local's argument that the administrator is a receiver supplanting the Local's right to self-government is frivolous. Unlike a receiver, the administrator has not replaced Local 28's officers. See Special Project, 78 Colum. L. Rev. at 835-37. The powers granted the administrator did not interfere in any way with Local 28's self-governance. Local 28 retains complete autonomy regarding its own elections and the collective bargaining process. To the extent that the administrator monitors admission to union membership or employment, such monitoring is fully justified by Local 28's "past recalcitrance" in response to court orders (A. 220).

In any event, as the court of appeals stated in 1976, "[w]hile union self-government is desirable and is, indeed, an ideal to which the law aspires, 29 U.S.C. § 401, [the] interest in union self-government cannot immunize Local 28 from the consequences of its actions" (A. 220). The principle of union self-governance has never been allowed to override requirements imposed by the labor laws or any other law. See *Wirtz v. Local 153, Glass Bottle Blowers Association*, 389 U.S. 463, 471 (1968)

(the freedom allowed unions to conduct their own elections is reserved for those elections which conform to the democratic principles written into 29 U.S.C. § 401); *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 857-59 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977) (collectively bargained agreements may be overridden if they "either violate[] Title VII or [are] inadequate in some particular to cure the effects of past discrimination").

Further, the administrator's appointment has not resulted, as Local 28 claims, in an abdication of judicial power.³⁰ First, the administrator was appointed *after* liability was determined to oversee implementation of the O&J and RAAPO (now AAPO). Thus, cases which concern the appointment of special masters to determine liability, such as *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), Pet. Br. at 45, are inapposite.³¹ See Special Project, 78 Colum. L. Rev. at 807. Second, because the administrator was appointed by the district court, is responsible to that court and is subject to review by that court, his appointment is not, as the union strains to argue, Pet. Br. at 45-46, in violation of Article III, Section 1, of the United States Constitution. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76-80 (1982); *United States v. Raddatz*, 447 U.S. 667, 681-84 (1980).

³⁰ A district court's authority to appoint an administrator stems not only from Fed. R. Civ. P. 53, as petitioners contend, Pet. Br. at 45, but also from the court's inherent power

to provide [itself] with appropriate instruments required for the performance of [its] duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners.

In Re Peterson, 253 U.S. 300, 312-13 (1920); see also *Ruiz v. Estelle*, 679 F.2d at 1159-61, and cases cited therein at 1161 n.240.

³¹ Indeed, *La Buy* supports the proposition that masters are particularly appropriate for making post-liability determinations. 352 U.S. at 249.

In sum, the appointment of the administrator in 1975 was proper, and because Local 28 has continued to refuse to comply with court orders, the district court's extension of the administrator's term in AAPO was clearly appropriate.

V. PETITIONERS' CHALLENGE TO ITS LIABILITY AND THE GOAL, BASED ON HAZELWOOD SCHOOL DISTRICT v. UNITED STATES, 433 U.S. 299 (1977), IS MERITLESS

Local 28 also quarrels with evidentiary determinations regarding statistics which the district court made over ten years ago. It contends that liability was improperly found and the 29% goal was improperly established because the appropriate percentage in the labor force which the district court found failed to discount disparities due to pre-Act discrimination and incorrectly drew the geographical boundaries of the labor market. Pet. Br. at 35. In support of these contentions, it points to this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), but relies almost exclusively on the views set forth in the dissenting opinion which Judge Meskill wrote in the 1977 appeal in this case. The union is now foreclosed from asserting these claims. See Point I, *supra*. These claims are also meritless.

The 1975 findings of discrimination were consistent with *Hazelwood*. In *Hazelwood*, this Court declared that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." 433 U.S. at 307-08. The Court observed, however, that an employer might rebut this proof by presenting proof that from the effective date of Title VII forward it made all of its employment decisions in a wholly nondiscriminatory way. *Id.* at 309. *Accord Teamsters*, 431 U.S. at 360. This Court also noted that what employment figures prove depends on which figures are compared. *Id.* at 310. The Court counseled that this is a factual determination which is to be made initially in the district court. *Id.* at 312.

In this case, few statistical comparisons were made because, as the district court found, the Local failed to maintain statistics as required by the EEOC regulations (A. 331, 329). Liability was not based on inferences that could be drawn from racial disparities between the proportion of minorities in the labor

market and in the union. Instead, liability was based on "direct and overwhelming evidence of purposeful racial discrimination over a period of many years" (A. 169), which began before the passage of the 1964 Civil Rights Act, and continued long after this case was initiated. See, pp. 2-3, 5 *supra*; Sol. Loc. 28 Br. at 18; A. 333 n.12 and A. 169, n.8, 212-15.

The 29 percent goal established by the district court a decade ago as a measure of when equality of opportunity within the Local could be achieved was based on a finding that the appropriate geographic area from which the membership of the union is drawn matched the geographic boundaries of the union's jurisdiction (A. 353). The local did not contest this finding at the time the decision was rendered.

Petitioners eventually raised this issue on their second appeal in 1977, but, as the court of appeals observed, simply did not show that a significant number of union members resided outside New York City (A. 168). Accordingly, the court of appeals affirmed the district court's finding (A. 168).⁴⁴ It is factual findings such as these, concurred in by two lower courts, which this Court has often stated that it is reluctant to disturb. *E.g.*, *Rogers v. Lodge*, 458 U.S. at 623; see *National Collegiate Athletic Association v. Board of Regents*, 104 S.Ct. at 2959 n.15 (1984).

⁴⁴ In view of the expanded jurisdiction of the union, the district court in August 1983 adjusted the goal and fixed it at 29.23%. Although, in the district court, the Local sought to prove that the adjusted goal should be fixed at 21.7% (A. 120), it now contends that "there is no evidence in the record from which the correct percentage [goal] could be derived" (Pet. Br. at 36), and urges a hiring goal of 16.2%. *Id.* at 36 n.26. The district court weighed conflicting evidence on this issue — indeed, New York City requested a 33% to 41% goal (A. 120) — and selected an "intermediate figure", *Hazelwood*, 433 at 312, of 29.23% (A. 122). The court of appeals affirmed (A. 33).

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT ABRAMS
*Attorney General of the
State of New York
Attorney for Respondent
New York State Division
of Human Rights
Two World Trade Center
New York, New York 10047
(212) 488-3943*

ROBERT HERMANN
Solicitor General

O. PETER SHERWOOD
*Deputy Solicitor General
Counsel of Record*

LAWRENCE S. KAHN
COLVIN W. GRANNUM
JANE LEVINE
MARTHA J. OLSON
Assistant Attorneys General

MARGARITA ROSA
*General Counsel
New York State Division of
Human Rights
55 West 125 Street
New York, NY 10027*

APPENDIX

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

§ Bl-7.0 Unlawful discriminatory practices: 1. It shall be an unlawful discriminatory practice:

* * *

(c) For a labor organization, because of the age, race, creed, color, national origin or sex of any individual to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

* * *

§ Bl-8.0 Procedure.

* * *

[Subdiv. 2]

(c) If, upon all the evidence at the hearing, the commission, or such members as may be designated, shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this title, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a program, apprenticeship training program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, evaluating application for membership in a club that is not distinctly private without discrimination based on race, creed, color, national origin or sex, payment of compensatory damages to the person aggrieved by such practice, as, in the judgment of the commission will effectuate the purposes of this title, and including a requirement for report of the manner of compliance. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice, the commission shall state its findings of fact and shall issue

and cause to be served on the complainant an order dismissing the said complaint as to such respondent. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereof. (Amended by L.L. 1984, No. 63, Oct. 24).

REPLY BRIEF

FEB 18 1986

JOSEPH F. SPANIOLO, JR.
NEW YORK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

— against —

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, THE CITY OF NEW YORK, and
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

MARTIN R. GOLD
Counsel of Record

ROBERT P. MULVEY
GOLD, FARRELL & MARKS
595 Madison Avenue
New York, New York 10022
(212) 935-9200

Attorneys for Petitioners

WILLIAM ROTHBERG
POPKIN & ROTHBERG
16 Court Street
Brooklyn, New York
(718) 624-2200

Co-Counsel for Local 28 JAC

EDMUND P. D'ELIA
655 Third Avenue
New York, New York
(212) 697-9895

*Co-Counsel for Local 28
and Local 28 JAC*

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No. 84-1656

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

— against —

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
THE CITY OF NEW YORK, and
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

PETITIONERS' REPLY BRIEF ON THE MERITS

STATEMENT OF THE CASE

The facts and history of the proceedings are accurately stated in petitioners' brief on the merits. They have been distorted by respondents and certain amici who argue that petitioners have "established a record of intransigent resistance to both the law and judicial decrees which is without parallel in the annals of equal employment litigation." (NAACP Legal Def. & Ed. Fund Br. 49). Such gross distortion is a necessary predicate for respondents' attempts to justify the racial quota and other forms of reverse discrimination imposed by the district court. They argue that different rules apply when dealing with disobedient parties.

By stating the facts in detail, petitioners are not asking this Court to review the 1975 finding of a pattern or practice of discrimination. Instead, petitioners have demonstrated that, quite apart from the lack of legal basis for respondents' argument, this case does not provide a factual basis for treating petitioners differently from other parties. A fair reading of the facts indicates that the tortured history of this litigation is not the result of resistance to integration. It is the product of a series of incorrect and misguided rulings, and intrusive, senseless and expensive regulation. Most significantly, it is the result of fixing a racial quota at a level which could not be achieved without gross reverse discrimination. When the quota was not achieved—as was inevitable—petitioners were blamed and punished.

As petitioners have indicated, the main 1975 findings were the result of petitioners having *obeyed* the earlier state court decree. (Pet. Br. 4-5). That decree had required petitioners to restrict admission to high school graduates, and to hire those who performed best on the entrance examination. The district court acknowledged that the procedures being followed were those mandated by the state court decree (A-328-331), but further stated that the intervening decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1970), outlawed entrance barriers which, though neutral on their face, had an adverse impact upon minorities. Such facts hardly support a conclusion that petitioners acted "intentionally", as is required for imposing any relief under §706(g) of Title VII.

Although other findings of a much less significant nature arguably support the "pattern or practice" findings (and although petitioners have not relitigated these findings in this Court), the record is devoid of factual support for the district court's conclusion that petitioners' actions required the intrusive remedies of a racial quota, an Administrator with supervisory control over them, or a detailed affirmative action program.

In addition, and quite apart from the illegality of *any* quota, the 29% figure—the focal point of the entire affirmative action program—was incorrectly computed by the district court. (Pet. Br. 7-8). In a related case, the percentage was calculated at 16.2% for the same labor market. (Pet. Br. 36 n. 26).

Until after the first contempt proceeding was filed in 1982, the Administrator, who was involved with this matter on almost a day-to-day basis, had never questioned any aspect of petitioners' compliance with the O&J or RAAPO. (JA-38c-d). It was no surprise that the quota had not been achieved. Interim reports and determinations by the Administrator document the reasons. (JA-167; 216-222). Economic chaos confronted the construction industry in New York City; membership in Local 28 had declined dramatically; many union members were unemployed; and union employment was at times as low as 42%. (JA-90). As a result, there was little interest in becoming a member of Local 28 or in becoming a trainee in the apprentice program. Even after completing the program, many dropped out. (JA-88-103; 133-137).

The record disproves the thesis of respondents and various amici that petitioners have continued to engage in racial discrimination and that they have effected "a campaign of evasion and resistance which rivaled in its ingenuity and intransigence the most defiant southern school boards and voting officials of a generation ago." (NAACP Legal Def. & Ed. Fund Br. 49). In fact, in order to attempt to achieve the quota and thereby terminate the endless regulation and financial drain imposed by the O&J and RAAPO, petitioners felt obliged to engage in as much reverse discrimination as was permitted by the respondents and the Administrator.

In March 1978, petitioners sought permission to dispense with the aptitude examination for admission to the apprentice program and to admit a fixed percentage of minorities to each class. Respondents objected, and the plan was not implemented at that time. Nevertheless, petitioners actively recruited minorities such that each class of apprentices between April 1977 and January

1980 consisted of 43 % -46 % non-whites.¹ When the August 1980 class fell to 33 % non-whites, petitioners again pressed for a direct quota in the apprenticeship program. This time all parties agreed, and since at least February 1981, each apprentice class has been 45 % non-white.² (JA-96-97).

After the first contempt proceeding, petitioners sought a major revision in RAAPO to permit direct racial quotas at all levels of membership, and to end the office of Administrator.³ The modified program agreed to by all parties was known as MAAPO. It was rejected by the district court. (Pet. Br. 13).⁴

¹ As reported to the Administrator, minority representation in the apprenticeship program prior to 1981 was as follows:

Date	Non-White	White	Total	% of Non-White
April/1977	33	40	73	45 %
April/1978	43	58	101	43 %
Aug/1978	49	58	107	46 %
Jan/1979	46	60	106	44 %
April/1979	49	61	110	45 %
Aug/1979	52	68	120	43 %
Jan/1980	49	64	113	44 %
Aug/1980	52	104	156	33 %

(JA-96).

² Although the vast majority of union members join through the apprentice program, integration is still a slow process. If each class has 100-150 members, it is evident that integration of a 2,000 member union would take time, even if all apprentices remained in the union, which they do not. (JA-134).

³ Instead of an Administrator, petitioners recommended that "such eminently qualified and publicly respected persons as Judge Marvin Frankel, Judge Harold Tyler and Honorable Basil Paterson" be considered as the arbitrator under MAAPO. (JA-38i).

⁴ MAAPO is not printed in the joint appendix because it was not included in the district court docket or file. Quite obviously, the district judge thought it was filed because his order disapproving it refers to it by paragraph number without, in many cases, describing the substance of the paragraph. (JA-31-38).

(Footnote Continued)

In its statement of the case, the State only briefly and grudgingly mentions, at the end of a footnote, that petitioners have

Paragraphs 7-9 of MAAPO contain the quotas applicable to the apprenticeship program and approved by the district court. (JA-33). These provisions are as follows:

7. In order to meet the objectives of this Modified Program, the parties agree that, at least until the non-white membership of the Local 28 reaches 29 %, the JAC shall not use an exam to choose apprentices. Applicants shall be ranked by experience and trade education which shall be confirmed by an interview conducted by the JAC. Those with experience and trade education will be placed at the top of the list. Those with equal experience and education shall be selected by lottery.

8. The JAC shall indenture a minimum of two classes of apprentices each year until such time as the non-white membership of Local 28 reaches 29 %. The classes shall be indentured in February and July of each year. There shall be no fewer than 35 apprentices indentured in each class.

9. Until such time as the non-white membership of Local 28 reaches 29 %, the JAC shall maintain separate white and non-white lists of apprentices, and shall indenture apprentices as follows:

- a) for the first three classes indentured after the effective date of this Modified Program, the first 15 apprentices in each class shall be non-white; number 16 and above shall be selected on the basis of one white for each non-white; and
- b) for classes four through eight, one white for each non-white; and
- c) for classes nine through eleven, the first 15 apprentices in each class shall be non-white; numbers 16 and above shall be selected on the basis of one white for each non-white; and
- d) for classes twelve and above, one white for each non-white; and
- e) each apprentice who drops out or is terminated during the first term shall be replaced by another apprentice of the same race or, if this is not possible, an additional apprentice of the same race shall be indentured in the next apprentice class.

voluntarily indentured apprentice classes consisting of 45% non-whites. (State Br. 8 n. 9). Even so, the State's footnote incorrectly asserts that the practice began in February 1981. As stated above, it began in 1977; 1981 was the first time it became institutionalized.

The State makes no mention of MAAPO, and the City's brief, which devotes more than 27 printed pages to the facts, makes no mention of any of the efforts by petitioners to obtain permission to directly enlist minorities. These undeniable facts simply do not fit respondents' preconceptions. Instead, the City and State concentrate on events which occurred prior to the finding of liability and creation of the program in 1975, and even events which occurred prior to the Civil Rights Act.

Petitioners have now been twice held in contempt, and punished, for failing to achieve the quota. The district court's finding, and respondents' arguments, that the individual specifications of contempt were the true substance of the proceeding do not withstand scrutiny. Since civil contempt is purely for remedial purposes or to exact compliance with a yet unobeyed order, it is telling to examine the portion of the order which petitioners are being forced to obey — the achievement of the quota. There is no interest in exacting compliance with the purported specifications of contempt because they are no longer timely. Thus, unlike cases where civil contempt is used to force a witness to testify, to end an unlawful work stoppage, or the like, here the particular allegations of contempt are no longer pertinent. For example, the records not submitted are no longer relevant, and the temporary permits issued to workers from sister unions have expired. There is simply nothing to coerce other than achieving the quota, or to punish petitioners for failing to achieve it.⁶

⁶ The fines requested by respondents — "\$100 per day for the period from July 1, 1977, the date the defendants first failed to meet an interim remedial goal" (A-465) — were clearly punitive and directly tied to the failure to achieve the quota.

The only contempt charge relating to discrimination is the underutilization of apprentices. As the Administrator reported to the district court, however, employers and contractors, who were not subject to the court's orders, controlled whether apprentices or journeymen were actually employed. The assignment of minority members to jobs has never been within the union's control.⁶ (JA-175-176). This fact is now totally ignored by respondents.⁷

⁶ By agreeing to paragraph 19 of MAAPO (See n. 4, *supra*), respondents acknowledged that utilization of apprentices was beyond the control of petitioners. It reads as follows:

Journeymen/Apprentice Ratio

19. a) Defendants recognize that in order to reach the 29% non-white membership goal as soon as possible, it is critically important that employers maintain the lowest possible journeymen to apprentice ratio consistent with safety and proper apprentice training. Defendants shall use best efforts to ensure that throughout the period this Modified Program is in effect, each employer maintains the lowest possible journeymen to apprentice ratio.

b) _____ weeks after the indenture of each class, the JAC shall prepare and transmit to plaintiffs an analysis of each employer's journeymen to apprentice ratio for the preceding six month period. The JAC shall send a questionnaire (Appendix E) to those employers identified by any party. Copies of responses to the questionnaire shall be mailed to plaintiffs on a weekly basis. Thereafter the Contractors' Association shall make available to plaintiffs individual employers to review their hiring practices. This in no way relieves defendants of their obligation pursuant to Paragraph 19(a) to use best efforts.

⁷ As Judge Winter noted below in dissent, the issue of underutilization was introduced in the case as an afterthought. It was first mentioned as a ground for contempt in respondents' reply papers and was seized upon by the district judge who obviously recognized that he could not follow the suggestions of the State and City (not the EEOC) and simply hold petitioners in contempt for not achieving the quota. (A-43).

The other specifications of contempt have little or nothing to do with the racial composition of the union. Nevertheless, the district judge concluded that "the collective effect of these violations has been to thwart the achievement of the 29% goal" (A-155). It is difficult to understand how misidentifying the race of two workers (Pet. Br. 10. n. 12) or failing to serve the O&J on several contractors, for example, affected the realization of the quota. Similarly, agreeing to an executory provision in a labor-management agreement which would have favored older workers in times of unemployment obviously had no effect, because the provision was never implemented. (A-17-18).

Finally, the O&J vested final authority over the utilization of the apprenticeship program with the Administrator, who had the overall responsibility for insuring petitioners' compliance with the program. (A-305-306). The Administrator supervised petitioners' compliance on a daily basis, and dictated or acquiesced in every decision affecting the entrance of minority workers into the union. As Judge Winter wrote:

My disagreement with the majority stems largely from its failure to address the fact that Local 28 had the approval of the administrator for every act it took that affected the number of minority workers entering the sheet metal industry. The majority's tacit premise thus is that full compliance with the specific terms of the O&J and RAAPO is legally insufficient to avoid sanctions for contempt if the 29% goal is not met. This holding transforms the 29% figure from a goal guiding the administrator's decisions into an inflexible racial quota.

(A-38-39).

Respondents are equally silent on the failure of the Administrator to take any steps until the eve of the deadline for achieving the quota. This fact does not conform with their predispositions and, hence, is ignored.

ARGUMENT

I

COURT-IMPOSED RACIAL QUOTAS AND RACE-CONSCIOUS REMEDIES ARE ILLEGAL UNDER TITLE VII

A. The Plan Imposes A Quota As That Term Is Defined By Authoritative Agencies

In 1973, before the entry of the O&J, the EEOC, the Department of Justice, the Civil Service Commission and the Office of Federal Contract Compliance issued a joint memorandum which set forth the operative distinctions between goals and quotas.⁸ Memorandum — Permissible Goals and Timetables in State and Local Government Employment Practices, *reprinted in* 2 Empl. Prac. Guide (CCH) ¶3776 (March 23, 1973). A quota system, under these guidelines, is one that:

would impose a fixed number or percentage which must be attained, or which cannot be exceeded. . . . Under such a quota system, that number would be fixed to reflect the population in the area, or some other numerical base, regardless of the number of potential applicants who meet necessary qualifications. If the employer failed, he would be subject to sanction. *Id.* at 3856.

Contrary to the State's position, the permanency or duration of the order is not a factor in distinguishing between a quota and a goal. The Solicitor agrees. Sol. Br. 24 n. 22 (" . . . we characterize any mandatory requirement for a fixed racial percentage as a quota, regardless of whether the percentage must be maintained in perpetuity. ").

⁸ The memorandum on goals and quotas stating the consolidated opinions of three agencies and a department of the executive, which are all charged with enforcement of the Civil Rights Act, is entitled to substantial weight and judicial deference. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945).

A goal, under the guidelines jointly developed, is a "numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the job market." *Id.* Because a goal implies good faith effort, an employer is "not subject to sanctions for failure to achieve the percentage, because he is not expected to displace existing employees or to hire unneeded employees to meet his goal." *Id.* These guidelines have been reaffirmed and consistently followed by the Equal Employment Opportunity Coordinating Council and the Office of Federal Contract Compliance Programs. (Brief of Amicus Curiae, National Association of Manufacturers 6 n. 4).⁹

Under these standards, quotas and not goals are before the Court in this case. The O&J was written in mandatory terms: "By July 1, 1981, Local 28 and JAC are hereby directed to achieve a non-white percentage of 29% in the combined membership of Local 28. . . ." (A-305). Although the district court, in response to the depressed economic condition of the sheet metal industry, subsequently extended the deadline for achieving the quota by one year (A-183-184), the court never deviated from the overall percentage "regardless of the number of potential applicants." (JA-88-129; 133-137).

In approving certain elements of MAAPO, which was rejected as a result of the Administrator's vigorous opposition to the modified plan which would have achieved the quota and ended his tenure (Pet. Br. 13), the district court expressly stated that the provisions were "quotas". Nevertheless, the court held the quotas justified "because of defendants' egregiously poor performance over the past (6) years." (JA-33).

⁹ See also, U.S. Dep't. of Labor, Authority Under Executive Order 11246, condensed in 71 BNA LAB. REL. REP.—News & Background Information 366 (July 1, 1969) where the Department of Labor defines a quota as a "fixed number or percentage of minority group workers" (emphasis in original) and a goal as a plan which does not require employment of a fixed percentage but only requires a "good faith effort" to come within general "ranges."

Finally, again consistent with the definition of a quota system, the court has imposed sanctions for failure to achieve the percentage (A-155-156), and has stated that if the nonwhite membership of 29.23% is not achieved by August 31, 1987, "defendants will face fines that will threaten their very existence." (A-123). In short, the affirmative action program, in each of its forms since 1975 and the manner in which it has been enforced, has all the hallmarks of an inflexible quota system, which all the parties agree is illegal under Title VII and which the Court has indicated is unconstitutional. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25 (1971).¹⁰

B. The 1964 Congress Barred Quotas And Preferential Race-Conscious Relief

Respondents have rewritten the legislative history of the Civil Rights Act of 1964, and have read artificial remedial distinctions into the clear Congressional intent and this Court's interpretations of Title VII. For example, they conclude that the frequent remarks of bipartisan supporters of the Civil Rights Act in 1964 forbidding the use of quotas or preferential treatment of minorities were not aimed at limiting a court's remedial powers following a finding of liability for racial discrimination, but rather reflect an intent not to impose liability for a preexisting racial imbalance.

¹⁰ Petitioners have previously demonstrated that the cases relied upon by the State and certain amici to uphold the quota and race-specific remedies on constitutional grounds are inapposite. Pet. Br. 28-35. Amicus Curiae, National Conference of Black Mayors, Inc., suggests that Congressionally-sanctioned precedent for race-conscious remedies may be found in the Freedman's Bureau Act of 1865, Act of March 3, 1865, Ch. 90, 13 Stat. 507, and its Amendment, Act of July 16, 1866, Ch. 200, 14 Stat. 173. The Freedman's Bureau Act, however, was not race-conscious. By its very terms, it provided emergency relief to "refugees and freedmen from rebel states." In accordance with the stated purpose of the Act, the Bureau provided "immediate and temporary assistance to freedmen and loyal white refugees" and "gave millions of rations to the destitute of both races." R.W. Patrick, *The Reconstruction of the Nation* 34 (1967). See also, K.M. Stamp, *The Era of Reconstruction, 1865-1877* 131 (1972); R. M. Hyman, *The Radical Republicans and Reconstruction 1861-1870* 196 (1967); Sol. Gen. Br. as amicus curiae in *Wygant v. Jackson Board of Education*, No. 84-1340 at 14.

The remarks of the bill's most articulate supporters are directly contrary to this restrictive interpretation. As previously set forth (Pet. Br. 21-27), the remarks of Representative Celler, 110 Cong. Rec. 1518, Senator Humphrey, 110 Cong. Rec. 6549, the joint interpretative memorandum issued by Senators Clark and Case, 110 Cong. Rec. 7214 and the House memorandum describing the bill as passed, 110 Cong. Rec. 6566, uniformly state that the federal courts, following a trial and a finding of liability for racial discrimination, could not impose quotas or preferential hiring as Title VII relief.

Additional remarks in the Senate further demonstrate that court-ordered preferential hiring or quotas were not to be imposed even after a finding of intentional discrimination, and that the remedies were limited to enjoining past discriminatory practices and ordering the hiring or reinstatement of identified victims.

Senator Kuchel, one of the opening speakers in support of the bill, dismissed charges that the legislation would permit court-ordered quotas:

Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to mediate or conciliate the dispute. It would have no opportunity to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued

by the Federal district court would, of course, be subject to appeal. But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination, which is in fact occurring. 110 Cong. Rec. 6563.

Senator Humphrey introduced an explanation of the House bill which he stated had been read and approved by the bipartisan floor managers from both houses of Congress. The analysis set forth the spectrum of remedies following a federal trial and a finding of liability:

The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay. . . .

The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. 110 Cong. Rec. 11847.

Senator Keating also stressed that "the bill does not provide in any way for quotas of any kind." 110 Cong. Rec. 8618. He further explained that following judicial findings of discrimination, the court could not order preferential hiring and that such an order would violate Title VII and the Constitution.

The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .

Title VII does not grant authority to the Federal Government . . .

An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution. 110 Cong. Rec. 9113.¹¹

C. The 1972 Amendment To The Civil Rights Act Did Not Authorize Quotas Or Preferential Race-Conscious Remedies

Respondents argue that in 1972, in passing Amendments to the Civil Rights Act that are inapplicable to this proceeding,¹² Congress *sub silentio* overcame its abhorrence to court-ordered racial quotas and other race-conscious remedies by adding the terms "but not limited to" and "or any other equitable relief as the court deems appropriate" to the remedial provision of Title VII, §706(g), 42 U.S.C. §2000e-5(g).

¹¹ None of the opinions of the courts of appeals which respondents and certain amici cite to demonstrate judicial approval of court-ordered preferential hiring contain any significant consideration of the Congress' intent to disallow quotas as a Title VII remedy. (State Br. 38-39; NOW Br. 32 n. 13). Indeed, the most extensive analysis by a circuit judge appears in the dissent filed by Judge Hays in *Rios v. Enterprise Ass'n of Steamfitters, Local 638*, 501 F.2d 622, 634-639 (2d Cir. 1974). He concluded that "nowhere in the 534 hours of Senate debate is there as much as an oblique suggestion that Congress intended to permit court-ordered racial quotas 'to eradicate the effects of past discriminatory practices.' " *Id.* at 636-637.

¹² Petitioners have previously demonstrated that the 1972 legislation did not apply to proceedings which were already in the courts prior to the March 24, 1972 effective date of the Amendments. (Pet. Br. 17 n. 14). This action was filed on June 29, 1971. (JA-372). The State, however, argues that the express limitation on the retroactivity of the Amendments, Pub. L. 92-261 §14, does not apply to "pattern and practice" suits instituted by the Justice Department. (State Br. 32 n. 32). This assertion is erroneous.

(Footnote Continued)

The sole expressed view of Congress, which relates to this language, however, indicates that it did not intend to authorize quotas, or to sanction class-wide remedies to unidentified victims of discrimination. The explanation of §706(g), as amended, is contained in the section-by-section analysis prepared by Senators Williams and Javits:

Section 706(g) — This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without backpay, as will effectuate the policies of the Act. Backpay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the backpay otherwise allowable.

One of the primary purposes of the 1972 legislation was to transfer jurisdiction over pattern and practice suits from the Justice Department to the EEOC. As specifically provided in amended §707(e) of Title VII, 42 U.S.C. §2000e-6(e), the transfer of jurisdiction over pattern or practice suits to the EEOC was effective on March 24, 1972. Section 707(d), 42 U.S.C. 2000e-6(d), further provided that the transfer would not affect suits commenced prior to the date of transfer.

Absent a clear Congressional mandate as to retroactivity, statutes are to be applied prospectively. *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner of Internal Revenue*, 323 U.S. 141, 164 (1944); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944); *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 198-199 (1913); *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296, 301-302 (1913); *United States v. American Sugar Refining Co.*, 202 U.S. 563, 577 (1906); *Reynolds v. M'Arthur*, 27 U.S. (2 Pet.) 417, 435 (1829); *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413-414 (1806).

The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168.

The debates before the Ninety-Second Congress which passed the 1972 Amendments also demonstrate that both Houses of Congress were of the view that Title VII already banned racial quotas as a remedy for past discrimination, and that the Amendments reaffirmed their commitment to exclude such quotas from the Civil Rights Act.

In rejecting amendments that would have specifically banned quotas, the debate indicates that Congress regarded the proposals as superfluous, and an attempt to abolish "Philadelphia Plan" affirmative action programs, which did not impose quotas and did not derive their authority from Title VII, but from Executive Order 11246.¹³

¹³ The Philadelphia Plan, affirmed in *Contractors Association v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), was promulgated under Executive Order 11246, 30 Fed. Reg. 12,319 (1965), which required contractors under federally-funded construction projects to agree to affirmative action programs for minority manpower utilization in exchange for the right to bid on projects. The Court of Appeals specifically held that the Plan did not constitute a quota system, which would be illegal under Title VII, because it was issued pursuant to Executive authority and not pursuant to the Civil Rights Act. *Id.* 442 F.2d at 171-173. Furthermore, the Court held that the Plan did not impose a quota, (Footnote Continued)

Representative Dent explained that his proposed amendment was directed at Philadelphia-type plans issued under Executive Order 11246 and that such preferential treatment was already prohibited by Title VII:

My . . . amendment would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program. This responsibility, which is now vested in the Office of Federal Contract Compliance of the Department of Labor, would be transferred by H.R. 1746 to the Commission. Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program. Legislative History of the Equal Employment

but merely set forth a range of goals for minority hiring in various trades, 442 F.2d at 164, which contractors were required to make "a good faith effort to achieve," 442 F.2d at 172, as a precondition for the right to bid on federal contracts. The Philadelphia Plan is thus in accord with the definition of a goal jointly established by the EEOC, the Department of Justice, the Civil Rights Commission and the Office of Federal Contract Compliance. 2 Empl. Prac. Guide (CCH) ¶3776. See also, Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84, 107 n. 115 (1970).

Similarly, Executive Order 11246 does not provide any independent basis for the quotas ordered against petitioners; respondents have not suggested otherwise. The Order merely requires that federal contractors not discriminate in employment and "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." The remedies for a violation of the Order, set forth in §209, include publishing the names of noncomplying contractors or unions, recommending that proceedings be instituted under Title VII, suspension of the contract and/or requiring that the contractor refrain from future contracts until the Secretary of Labor is satisfied that the employment practices are in compliance with the Order. The Order does not require quotas or preferential hiring as a remedy for past discriminatory practices. Note, *Executive Order 11246: Anti-Discrimination Obligations In Government Contracts*, 44 N.Y.U.L. REV. 590, 591, 599 (1969).

Opportunity Act of 1972, prepared by Subcomm. on Labor, Sen. Comm. on Labor and Public Welfare 190 (1972) (hereinafter 1972 Leg. Hist.)

An exchange between Representatives Erlenborn and Hawkins further clarifies this point:

Mr. Hawkins. Under the current law, a quota of preferential treatment is denied. That is a part already of Title VII of the Civil Rights Act.

* * *

You just said that the law prohibits the establishment of quotas. You are referring to Title VII of the Civil Rights Act of 1964?

Mr. Hawkins. Yes.

Mr. Erlenborn. You are not referring to the Executive order of the President from which the authority for the OFCC was derived?

Mr. Hawkins. I have read the Attorney General's opinion and I assume you did also. As you no doubt saw, the Attorney General says that, in his opinion, the provisions of the Philadelphia plan do not contravene the law of the prohibitions in Title VII.

So as I read the amendment, the amendment does not prohibit anything that the law does not already prohibit. It was never the intent, as the present Attorney General states in his opinion, that an Executive order should contravene what the law prohibits. So squaring this, it seems to me when we talk about prohibiting quotas and talk of preferential treatment, we are merely reflecting what is in the present law. While this amendment clarifies things, it does not do anything that is not already prohibited. 1972 Leg. Hist. 209.

See also Remarks of Representatives Dent and Pucinski, 1972 Leg. Hist. 234-235 and Remarks of Rep. Hawkins, 1972 Leg. Hist. 204, 206.

Representative Green, while of the view that Executive Order 11246 operated to establish a quota system, similarly concluded that such preferential relief was barred by Title VII:

Title VII of the Civil Rights Act has always prohibited the establishment of quotas. During the legislative history of the Civil Rights Act, it was clearly the congressional intent not to bring about civil rights for some by denying civil rights to others. We had seen that for decades. We were trying to end it. The legislative history of the Civil Rights Act—the debate in the Senate and the House shows that it was not the congressional intent to establish quotas of any kind in our struggles to bring about equality of opportunity. 1972 Leg. Hist. 209-210.

Following Representative Green's remarks, Representative Ford stated: "The Philadelphia plan, which is what we are talking about, does not have anything to do with quotas," 1972 Leg. Hist. 261, and Representative Erlenborn further explained: "I hope that the contribution of the gentlewoman from Oregon has not confused the committee, because the language she read from Title VII of the Civil Rights Act is undisturbed by the Committee bill, and undisturbed by the Erlenborn substitute. Neither one is going to repeal the prohibition against quotas that is in Title VII of the Civil Rights Act." *Id.* Finally, it should be noted that the foregoing debate arose over consideration of whether the EEOC should be afforded cease and desist powers, see Remarks of Representative Chisholm, *id.*, an unlikely forum for overturning the ban on preferential remedies contained in the 1964 legislation. See also, Amicus Curiae Brief of Local 542, International Union of Operating Engineers and Local 36, International Association of Firefighters, AFL-CIO, at 10-13. ¹⁴

¹⁴ The brief debate in the Senate which rejected the Ervin Amendment to abolish quotas and preferential remedies followed similar lines as the House discussion. Again, the proposed legislation was rejected as an attack on "Philadelphia-type plans." Remarks of Sen. Javits, 118 Cong. Rec. 1664-1665.

As the section-by-section analysis of the 1972 Amendments demonstrates, 118 Cong. Rec. 7168, Congress did not intend to make any sweeping change to §706(g) by the inclusion of the term "other equitable relief". The original intent to limit relief under §706(g) to injunctive and make-whole relief to actual victims of discrimination remained undisturbed. Both houses of Congress in 1972 adhered to the view that Title VII did not authorize court-ordered quotas.

In the absence of action by a subsequent Congress amending a statute, the intent of the Congress that originally enacted it is the basis for interpreting its meaning. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977).

D. This Court Has Uniformly Limited Title VII Relief To Identified Victims Of Discrimination

Relying exclusively on general language as to the overall purpose of Title VII, which is to eliminate the vestiges of past discrimination, the State seeks to transform these statements into a separate remedy authorizing race-conscious relief to unidentified victims of discrimination. State Br. 29-32. The Court, however, in each of its extended interpretations of the remedial section of Title VII, has expressly limited remedies to make-whole relief to actual victims of past discrimination.

In both *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Court considered remedies imposed under Title VII, §706(g), following judicial findings that the defendants had engaged in a pattern or practice of racial discrimination. In *Franks*, after reviewing the primacy of make-whole or "rightful place" relief under §706(g), as amended, 424 U.S. at 763-764, the Court expressly limited the award of retroactive seniority relief to "actual victims of racial discrimination." *Id.* 424 U.S. at 772-773. Class-wide relief to individuals who could not prove racial discrimination was clearly not contemplated.

Similarly, in *Teamsters*, the United States successfully prosecuted a pattern or practice suit against an employer and a union. The Court exhaustively analyzed the procedure for determining whether individual claimants for relief were actual victims of discrimination and thus eligible for relief. 431 U.S. at 356-377. This lengthy discussion would not have been necessary if courts, as the State and various amici argue, are permitted under Title VII to grant class-wide relief to unidentified nonvictims.

In *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), the Court followed its earlier decisions in *Franks* and *Teamsters* and reversed an order which would have benefited unidentified victims of racial discrimination at the expense of the vested seniority rights of other workers. After reviewing the legislative history of §706(g), Justice White concluded that the "Court of Appeals holding that the District Court's order was permissible as a Title VII remedial order ignores not only our ruling in *Teamsters* but the policy behind §706(g) as well." 104 S. Ct. at 2590. Moreover, the Court specifically rejected any expansive reading of the 1972 Amendments, which respondents and certain amici here, as well as in *Stotts*, argued had effected a change in policy by adding the term "other equitable relief." *Id.* 104 S. Ct. at 2590 n. 15. Similarly, the *Stotts* Court also rejected the argument renewed by the State here that the 1972 Congress codified intervening lower court Title VII decisions upholding class-wide racial remedies. (State Br. 38-39). In rejecting this contention, the Court relied on the 1972 section-by-section analysis relative to §706(g) which indicated that the Amendment would have no effect on that provision, and which reconfirmed that "make whole" relief to actual victims of discrimination was the proper remedy under the subsection. *Id.*

In sum, this Court has not only never approved racial quotas as Title VII relief but has consistently ruled that such remedies must be carefully tailored so as to benefit only identified victims of discrimination in which the victims are able to prove their entitlement to relief through competent evidence.¹⁵

¹⁵ Alternatively, the State contends that even if Title VII prohibits the remedies ordered by the district court, the relief may be sustained under a local ordinance, (Footnote Continued)

The State and various amici finally argue that the quota was necessary and must be continued because of petitioners' history of recalcitrance and egregious discrimination. As the statement of the case indicates, this case does not provide the factual basis for such an argument. In any event, the argument ignores the limitation on the federal courts' power to fashion relief. Such relief is limited to that available under the particular statutory scheme under which jurisdiction is conferred. *See TVA v. Hill*, 437 U.S. 153, 195 (1978) ("[i]n our constitutional system, the commitment to the separation of powers is too fundamental for [the courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'").

N.Y.C. Administrative Code §B1-7.0. The federal complaint was based exclusively on Title VII and Executive Order 11246 (JA-372), and there is little indication in the extensive record of this case that the district court ever exercised pendent jurisdiction over this ordinance. Moreover, during the debates on the Civil Rights Act, Congress stated that Title VII would preempt contrary provisions of state and local law. "Existing State laws will remain in effect except as they conflict directly with Federal laws." Remarks of Representative Celler, 110 Cong. Rec. 1521, Remarks of Representative Dent, 110 Cong. Rec. 2602. Congress' intent to eschew conflicting remedial interpretations of Title VII under local authority was written into the Civil Rights Act as §708, 42 U.S.C. §2000e-7, which provides:

Effect on State Laws:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

An omnibus provision applying to all of the titles of the Civil Rights Act and validating State laws unless "inconsistent with any of the purposes of this Act" was written into Title XI §1104, 42 U.S.C. §2000h-4.

Under the express terms of §708, the State's belated reliance on an obscure ordinance, never actively litigated in fifteen years of judicial proceedings, cannot justify preferential remedies, which constitute unlawful employment practices under §§703(c)(1) and (2), (d), and (j), 42 U.S.C. §§2000e-2(c)(1), (2), (d), and (j) and are contrary to the remedies available under section 706(g), 42 U.S.C. §2000e-5(g).

II

ALL OF THE QUESTIONS PRESENTED ARE RAISED IN A TIMELY MANNER

A. *Neither Res Judicata Nor Law Of The Case Limits This Court's Review Of Issues Raised In The Petition*

Relying on cases in which the Court applied *res judicata* principles where the petitioners sought review of orders they had never appealed to the circuit courts,¹⁸ respondents contend that the Court is foreclosed from reviewing many of the issues which have been raised. They contend that the O&J, which established the affirmative action program and the quota, the question of whether the quota was calculated in conformity with *Hazelwood School District v. United States*, 433 U.S. 299 (1977), and the propriety of the creation and continuation of the office of the Administrator are all beyond the power of this Court to review.

Respondents ignore the fact that, in 1975, petitioners timely appealed the O&J, the findings of liability for the violation of the Civil Rights Act, the Affirmative Action Program and Order (AAPO), the propriety of the quota under Title VII, and the appointment of the Administrator. (A-207-229). In 1977, petitioners timely appealed RAAPPO and the quota calculation. (A-160-181). Finally, on the appeal from which certiorari was granted, petitioners timely appealed the Amended Affirmative Action Program and Order (AAAPPO), the constitutionality and propriety under Title VII of the amended racial quota, the continuation of the Administrator, the orders adjudicating petitioners in contempt, and the orders effectuating the contempt remedies, including the Fund order. (A-1-52).

¹⁸ See, e.g., *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-399 (1981); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 n. 5 (1980); *Pasadena Board of Education v. Spangler*, 427 U.S. 424, 432 (1976).

This Court has never imposed a requirement that a party must seek separate writs of certiorari addressed to successive rulings of a Court of Appeals in a continuing controversy to avoid preclusion. The consequence of such a rule on litigants and the Court is readily apparent.¹⁷ Rather, in these circumstances the Court has applied the more flexible, and discretionary, law of the case doctrine, which does not bind the Court in reaching the merits of earlier determinations.

In *Messenger v. Anderson*, 225 U.S. 436, 444 (1912), a case which went to the Circuit Court of Appeals three times before certiorari was sought, Justice Holmes explained the rule as follows:

The judgment of the lower court was pleaded, but it was held by the Circuit Court of Appeals after the affirmation by the Supreme Court that its own previous decision was the law of the case and that it was not at liberty to reverse the judgment even if the matter was *res judicata* on the principle laid down in *New Orleans v. Citizens' Bank*, 167 U.S. 371, 396. See *Parish v. Ferris*, 2 Black 606. In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *King v. West Virginia*, 216 U.S. 92, 100. *Remington v. Central Pacific R.R. Co.*, 198 U.S. 95, 99, 100. *Great Western Telegraph Co. v. Burnham*, 162 U.S. 339, 343. Of course this court, at least, is free when the case comes here. *Panama R.R.R. Co. v. Napier Shipping Co.*, 166 U.S. 280. *United States v. Denver & Rio Grande R.R. Co.*, 191 U.S. 84.

¹⁷ Because the denial of certiorari has no preclusive effect, petitioners are in the identical posture had they sought certiorari from the earlier Court of Appeals' decisions, and the Court had denied their petition. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n. 1 (1973); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950).

Similarly, in cases that were before the Courts of Appeals on two occasions before certiorari was sought, the Court has rejected claims that its review was limited by *res judicata* or the law of the case established in the first appeal. In *United States v. A.S. Kreider Co.*, 313 U.S. 443, 445-446 (1941), the Court reversed a judgment entered nine years earlier following two appeals. As here, the Circuit Court of Appeals concluded that it was bound by the law of the case as established by its earlier decision.¹⁸ This Court, however, ruled it was not precluded from reviewing the original determination. See also, *Burnrite Coal Briquette Co. v. Riggs*, 274 U.S. 208, 215 (1927); *Diaz v. Patterson*, 263 U.S. 399, 402 (1923) ("The opinion of the Circuit Court of Appeals was not *res judicata* or conclusive here, as the defendant seems to suppose."); *Southern Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922).¹⁹ In the foregoing cases, petitioners did not seek certiorari to the Court from the first, or, in *Messenger*, from the first or second appeals. Nevertheless, the Court reached the underlying merits of the original judgments and orders. See also, *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950) ("it requires a final judgment to sustain the application of the rule of the law of the case," which "is only a discretionary rule of practice . . . not controlling here.") *Zeckendorf*

¹⁸ Judge Meskill, dissenting from the decision on the second appeal below, specifically stated that this Court would not be "bound by our law of the case. . . . [in] our prior decisions," (A-170), clearly indicating that this Court could reach issues raised in all appeals when the case ultimately reached it on certiorari.

¹⁹ Even if the more stringent doctrine of *res judicata* applied, it would not foreclose this Court's consideration of orders that were beyond the remedial scope of Title VII. See, e.g., *New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953); *Hansberry v. Lee*, 311 U.S. 32 (1940). In 1876, Mr. Justice Field, writing for a unanimous Court in *Windsor v. McVeigh*, 93 U.S. 274, 282 (1876), explained the limitation of the *res judicata* doctrine when applied to remedial orders. *Res judicata*, the Court ruled, does not preclude Supreme Court review of such orders if their provisions exceeded the powers conferred by statute.

v. Steinfeld, 225 U.S. 445, 454 (1912); *Remington v. Central Pac. R.R. Co.*, 198 U.S. 95, 100 (1905).²⁰

*B. The Validity of Earlier Orders
Is Before The Court On Review
Of Civil Contempt*

If, as the respondents and the Solicitor agree, petitioners were held in civil, as opposed to criminal, contempt,²¹ the validity of

²⁰ *Arizona v. California*, 460 U.S. 605 (1983), is fully in accord. *Arizona* involved a decree settling water rights of Indian tribes, which the Court had entered in 1964. The Court declined to apply law of the case "into the situation of our original jurisdiction." *Arizona* is thus entirely distinguishable because in the present case the Court has not previously determined any of the issues with respect to these parties.

²¹ Respondents and the Solicitor have not contested petitioners' authorities that civil contempt fines, which are in the nature of damages awarded to a party injured by contumacious conduct, must be based on evidence of actual losses. (Pet. Br. 38-39). See also, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455-456 (1932); *United States v. Aberbach*, 165 F.2d 713, 715 (2d Cir. 1948) (dismissing civil contempt fines where the evidence did not support a "reasonable relationship between the fine and damages"); Note, *Recent Applications Of The Civil-Criminal Contempt Distinction*, 15 U. CHI. L. REV. 202, 208 (1947) (In civil contempt "the courts have always followed the accompanying principle that the amount of such a compensatory fine must be based on clear evidence of the complainant's losses, particularly of profits lost and the expenses of litigation").

The fines imposed against petitioners were not directed toward compensating respondents, but toward creating an Employment, Training, Education and Recruitment Fund ("Fund") to enhance the educational levels and recruitment opportunities of the New York minority population. Such fines, imposed for the public benefit, may only be ordered in criminal contempt proceedings. *Leman v. Krentler-Arnold Hinge Last Co.*, *supra*, 284 U.S. at 455-456 ("a proceeding for civil contempt is for the purpose of compensating the injured party, and not, as in criminal contempt, to redress the public wrong. . . .").

Hutto v. Finney, 437 U.S. 678 (1978), and *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), are not to the contrary. In *Hutto*, the Court was considering a punitive award of attorneys' fees for the bad faith of recalcitrant

(Footnote Continued)

the O&J and RAAPO which imposed the quota and the ministerial obligations upon which the contempt was purportedly premised are before the Court on appeal of the contempt orders, and the contempts must fall if these obligations were, in whole or in part, beyond the remedial scope of Title VII.

Reviewability of the underlying order on appeal of contempt is one of the fundamental distinctions between civil and criminal contempts. See, e.g., *United States v. United Mine Workers*, 330 U.S. 258, 294-295 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911) ("it becomes necessary carefully to consider whether this was a case at law for criminal contempt where the evidence could not be examined for a want of a bill of exceptions; or a case in equity for civil contempt, where the whole record may be examined on appeal and a proper decree entered."); *Worden v. Searls*, 121 U.S. 14, 25 (1887); *Ex parte Fisk*, 113 U.S. 713, 718 (1885) ("When, however, a court of the United States, undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court

litigants. Although the Court drew an analogy to civil contempt remedies, contempt was not before the Court and nothing in that opinion demonstrates a departure from the Court's rulings on the proper measure of compensatory civil contempt fines. In *McComb*, a suit for unpaid wages and overtime under the Fair Labor Standards Act, the contempt fines were carefully structured to "compute the weekly and monthly amount that is due each employee. . . ." *Id.* 336 U.S. at 194. Although the Court tacitly acknowledged that it was departing from precedent by making the award payable to the Administrator, the Court observed that the Administrator was statutorily empowered to bring such actions, and the formula for computing back wages was more expeditious than awaiting individual suits by employees. *Id.* 336 U.S. at 194-195. The fine in *McComb* ultimately providing restitution of lost wages to individual employees bears no resemblance to the Fund order which grants class-wide relief to unidentified nonvictims of petitioners' discrimination.

While the identical conduct may result in both civil and criminal contempt sanctions in the same proceeding, *United States v. United Mine Workers*, 330 U.S. 258 (1947), criminal contempt penalties may not be imposed absent the due process safeguards required in criminal proceedings (Pet. Br. 40-41), which were indisputably denied to petitioners.

had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void"); *Ex parte Rowland*, 104 U.S. 604, 612 (1882) ("But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements."). *Accord: Ex parte Young*, 209 U.S. 123, 143 (1908). *See also*, Rodgers, *The Elusive Search For The Void Injunction: Res Judicata Principles In Criminal Contempt Proceedings*, 49 BOSTON U. L. REV. 251, 251 n. 1 (1969); Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 782 n. 13 (1943); Note, *Contempt Liability For Disobedience Of Defective Court Order*, 15 BROOKLYN L. REV. 166 (1947).

The basis for inquiring into the validity of the underlying orders in civil contempt has been explained in Wright, et al., *Civil and Criminal Contempt In Federal Courts*, 17 F.R.D. 167, 177 as follows:

Since civil contempt proceedings are part of the original cause and are designed to insure to the plaintiff compliance with the court's judgment in the main case, the proceedings in the civil contempt action stand or fall with those in the original cause. *Gompers v. Buck's Stove & Range Co.*, supra; *Anargyros v. Anargyros & Co.* C.C.N.D. Cal. 1911, 191 F. 208. This is so whether the court in the main action is reversed on non-jurisdictional or on jurisdictional grounds and whether, in the latter case, the parties did or did not contest its jurisdiction.

Similarly, the Court of Appeals for the Second Circuit in its *per curiam* decision in *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 86 F.2d 727 (2d Cir. 1936), elaborated:

A conviction for criminal contempt may indeed survive the reversal of the decree disobeyed; the punishment is to vindicate the court's authority which has been equally flouted whether or not the command was

right. But the same cannot be true of civil contempts, which are only remedial. It is true that the reversal of the decree does not retroactively obliterate the past existence of the violation; yet on the other hand it does more than destroy the future sanction of the decree. It adjudges that it never should have passed; that the right which it affected to create was no right at all. To let the liability stand for past contumacy would be to give the plaintiff a remedy not for a right but for a wrong, which the law should not do.

The foregoing analysis is undisturbed by the authorities raised by respondents and the Solicitor. In *Walker v. City of Birmingham*, 388 U.S. 307, 313-314 (1967), and *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922) (Sol. Br. 17), the Court's discussion was limited to criminal contempts. Petitioners do not contend that review of the underlying order is permissible in the context of criminal contempt. Both criminal and civil contempt orders were involved in *United States v. United Mine Workers*, 330 U.S. 258 (1947), but the Solicitor has only cited that portion of the opinion dealing with criminal contempt, *id.* at 293-294, despite the fact that the Court clearly stated that the validity of the underlying orders was reviewable when the contempt was civil in nature. *Id.* at 294-295. There was no actual contempt order before the Court in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439 (1976), and the Court limited its discussion to possible criminal contempt sanctions for violating the injunction, relying exclusively on *Howat*, *Walker* and *United Mine Workers*.

Maggio v. Zeitz, 333 U.S. 56 (1948), and *United States v. Rylander*, 460 U.S. 752 (1983), are also inapposite. In those cases, the only issue before the Court reviewing the contempts was the strictly factual question of whether the contemnors had goods or documents actually in their possession at the time they were ordered to turn them over pursuant to orders of the bankruptcy and district court judges. No question was raised as to whether the district court or the bankruptcy judge had the authority to issue the turnover orders under the statutes they were enforcing.

As *Ex parte Fisk*, *Ex parte Rowland* and the commentators referred to at p. 28, *supra*, agree, a different analysis is required when questions are raised as to the validity of the order itself as being beyond the statutory scheme before the court. Cf. *Windsor v. McVeigh*, 93 U.S. 274, 282 (1876). Moreover, in *Maggio*, the Court reviewed the validity of the underlying order to prevent a manifest injustice, and refused to enforce it.

Finally the state contends that *NLRB v. Local 28, International Brotherhood of Teamsters*, 428 F.2d 994, 999 (2d Cir. 1970), establishes a rule that the validity of the underlying order is not in question when a permanent injunction has been violated. However, unlike the present case where petitioners appealed the injunction (A-207-229), that case involved an unappealed permanent injunction to which, as previously stated, *res judicata* applies as opposed to the less stringent law of the case doctrine. Moreover, the court's discussion indicates that it was not stating an ironclad rule, but rather a discretionary application: "the doctrine of *res judicata* . . . *militates in favor* of barring collateral attacks upon permanent injunctions." (Emphasis added). As the State specifically acknowledges, the civil contempt proceeding in this case was not collateral; it was brought as a motion in the same litigation which has been a continuing matter since 1971. (State Br. 25-26 n. 26).

CONCLUSION

Petitioners respectfully pray that the judgment of the United States Court of Appeals for the Second Circuit be reversed; that all outstanding orders and judgments be vacated, and that the underlying proceedings be dismissed.

Dated: New York, New York
February 18, 1986

Respectfully submitted,

MARTIN R. GOLD
Counsel of Record
ROBERT P. MULVEY
GOLD, FARRELL & MARKS
595 Madison Avenue
New York, New York 10022
(212) 935-9200

Attorneys for Petitioners

WILLIAM ROTHBERG
POPKIN & ROTHBERG
16 Court Street
Brooklyn, New York
(718) 624-2200

Co-Counsel for Local 28 JAC

EDMUND P. D'ELIA
655 Third Avenue
New York, New York
(212) 697-9895

*Co-Counsel for Local 28
and Local 28 JAC*

REPLY BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION AND LOCAL 28
JOINT APPRENTICESHIP COMMITTEE, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CHARLES FRIED

Solicitor General

WM. BRADFORD REYNOLDS

Assistant Attorney General

CAROLYN B. KUHLM

Deputy Solicitor General

MICHAEL CARVIN

Deputy Assistant Attorney General

SAMUEL A. ALITO, JR.

Acting Assistant to the Solicitor General

BRIAN K. LANDSBERG

DENNIS J. DIMSEY

DAVID K. FLYNN

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

JOHNNY J. BUTLER

Acting General Counsel

Equal Employment Opportunity Commission

Washington, D.C. 20507

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1656

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION AND LOCAL 28
JOINT APPRENTICESHIP COMMITTEE, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

There is much in the briefs submitted by our fellow respondents, the City and the State, with which we fully agree, and accordingly there is no need for us to reply to many of their arguments. Most fundamentally, we agree that petitioners are guilty of pronounced and protracted discrimination. After all, we initiated this suit, have litigated it for more than a decade, and have not abated in our efforts to bring about complete and long overdue compliance with Title VII. We also agree that petitioners were properly adjudged in civil contempt, and we support the imposition of effective sanctions to end petitioners' contumacy.

We part company with our fellow respondents only with respect to the appropriate remedy. We favor the enforcement of nondiscrimination through the use of

strong measures, including fines and imprisonment, directed against those responsible for petitioners' discrimination and contempt. We favor innovative, affirmative measures to recruit and encourage nonminority membership in the union. But we do not favor discrimination against innocent members of some racial and ethnic groups for the purpose of ending discrimination against others. We therefore do not support quotas or other forms of racially restricted relief.

In *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206 (June 12, 1984), this Court recognized that under Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), "not even a Court * * * could order * * * admission to [union] membership * * * for anyone who was not discriminated against in violation of this title."¹ In this case, however, the State of New York has nevertheless argued that Title VII authorized the district court to order preferential admission to union membership for persons who were not discriminated against in violation of Title VII. The City of New York opposes the 29.23% membership "goal" and declines to offer a legal defense for this provision of the court's order (City Br. 29). However, the City does support the provision of the district court's order totally barring all whites from the programs financed by the apprenticeship fund. In supporting such racially restricted measures, the State and City are wrong.

1. The State first attempts to defend the 29.23% membership "goal"² and the racially restricted features of the

¹ Slip op. 18, quoting 110 Cong. Rec. 14465 (1964) (bipartisan newsletter of Senate sponsors) (ellipses added).

² There is no merit in the State's argument that *res judicata* bars petitioners from challenging the order modifying and reimposing this "goal" (State Br. 27-28). We rely on our opening brief in response to this contention (at 25-26 n.24), and add only that the cases cited by the State for its *res judicata* argument involve orders that finally settled specific claims rather than a situation where a court retains jurisdiction to enforce an injunction or, as

apprenticeship fund on the ground that they are within the scope of the district court's inherent contempt power (State Br. 28-39) and are accordingly valid irrespective of whether they are barred by Title VII (*id.* at 37-39). The City joins this argument with respect to the fund (City Br. 29-30).

At the outset, we reiterate our skepticism that the district court relied on its contempt power in entering these measures. As the State argues, the district court acknowledged that "the new goal of 29.23% essentially is the same as the goal set in 1975," which was entered pursuant to Title VII (State Br. 27, quoting Pet. App. A23). The City, moreover, acknowledges (City Br. 26) that the district court adjusted the quota to 29.23% solely in order "to reflect the increase in membership due to the merger [with other unions] and an increase in the non-white population." Furthermore, the court of appeals analyzed the quota exclusively with respect to whether it violates Title VII or equal protection (Pet. App. A27-A31). Nevertheless, as we stated in our opening brief (at 24-25), it does not matter for present purposes whether the district court relied solely on Title VII or whether it also relied upon its civil contempt power, for the contempt power does not justify the imposition of relief expressly prohibited by the law that the court is seeking to enforce.

here, actually reimposes and alters provisions of that injunction (see State Br. 27-28, citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Nevada v. United States*, 463 U.S. 110 (1983); *Commissioner v. Sunnen*, 333 U.S. 591 (1948)). Where a continuing injunction remains in effect, a party may move to modify the decree and the court retains inherent power to order such modification. See *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). Here, of course, the court not only continued but reordered and altered the injunction based upon its perception of changed facts. A party cannot be barred from opposing such an order merely because the court had imposed a similar obligation in the past, particularly where, as here and in *System Federation*, there has been a change in the law supporting such an injunction.

The argument of the City and State based on the district court's contempt power is contrary to the plain language of Section 706(g). Section 706(g) does not provide that "some orders of a court" may not require the admission of nonvictims to unions. It does not provide that "no order of the court except those characterized as contempt orders" may require the admission of nonvictims. It provides simply and unequivocally that "no order of the court" may require such relief.

Moreover, the City and State have cited no case law supporting their position. The cases on which opposing respondents rely (see State Br. 38) do not suggest that a court may flout a specific statutory prohibition such as Section 706(g) when imposing civil contempt sanctions. To the contrary, *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), states that a court's inherent equitable powers are available "[u]nless otherwise provided by statute." In the present case, Congress "has otherwise provided" by enacting Section 706(g).³ In addition, the constitutional guarantee of equal protection also restricts the permissible scope of contempt sanctions that may be ordered by a federal court; this principle prohibits government from awarding racial preferences that are not necessary to make whole actual victims of specific discriminatory acts.⁴ See U.S. Brief, *Wygant v. Jackson Board of Education*, cert. granted, No. 84-1340 (Apr. 15,

³ The conclusion that Congress meant what it said when it used the phrase "no order of the court" is not a "questionable inference from[] or doubtful construction[] of statutory provisions" (State Br. 39, citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)).

⁴ The serious constitutional questions that would result from a holding that Section 706(g) permits court-ordered racial preferences for nonvictims militate strongly in favor of our interpretation of Title VII. See *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available").

1985), and our petition for a writ of certiorari in *Orr v. Turner*, No. 85-177, served with our opening brief.⁵

Not only is the civil contempt argument devoid of support in the language of Title VII and the case law, but it defies common sense. The purpose of coercive civil contempt sanctions is to secure compliance with the underlying statute. It is self-contradictory to impose a contempt sanction that violates a statutory directive regarding permissible remedies supposedly in order to secure compliance with the statute.

The purpose of Section 706(g) is not abstract, and this purpose applies with equal force whether a court is entering a remedial order in a Title VII case or a civil contempt sanction. The purpose is to ensure that a court-ordered remedy for discrimination does not itself discriminate against innocent persons. To such individuals, the harm inflicted by a race-restricted order is just as palpable and just as wrong no matter what rubric is attached to the court order.

The principle that a contempt sanction may not inflict harm on innocent persons was recognized by this Court in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-442 (1911), where the Court indicated that a contempt order may burden only those who have disobeyed an order of the court. Explaining that this limitation applies irrespective of whether the contempt order is characterized as civil or criminal, the Court emphasized that a contempt order can be directed only at an individual who has been accused of violating and found to have violated the order (*ibid.*):

[I]n either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the

⁵ The State admits that the scope of a district court's contempt power is limited by the Constitution (State Br. 39, citing *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 406 (1971) (Harlan, J., concurring)).

order, and a prayer that he be attached and punished therefore.

Judge Learned Hand's opinion for the Second Circuit in the leading case of *Alemite Manufacturing Corp. v. Staff*, 42 F.2d 832 (1930), contains a persuasive application of the principle that the contempt power of the courts should be felt only by those who have disobeyed an order. Reversing a contempt judgment against a defendant who had previously been dismissed from the case, the court recognized that a court's "equitable" jurisdiction does not permit the imposition of contempt sanctions even against nonparties who act in a manner that the court views as inconsistent with the decree (42 F.2d at 832-833). Emphasizing the necessity of limiting the court's equitable powers so as to avoid penalizing those who were not enjoined and had not, because they were not parties, had their day in court, the court commented (*id.* at 833 (emphasis added)):

It is by ignoring such procedural limitations that the injunction of a court of equity may by slow steps be made to realize the worst fears of those who are jealous of its prerogative. The District Court had no more power in the case at bar to punish the respondent than a third party who had never heard of the suit.

In the present case, the quota and the racial restrictions in the fund order violate this precept. They punish innocent third parties, *i.e.*, innocent nonminority members who may wish to enter the sheetmetal trade. As we said in our opening brief (at 35), we support the imposition of "the strongest possible measures to bring about complete, and long overdue, compliance with Title VII." But those sanctions should be directed at those responsible for the union's contumacy, not innocent nonunion members.

2. Since a civil contempt sanction in a Title VII case cannot contravene Title VII, we turn again to the crux of

this case: the permissible scope of remedial relief under Title VII.⁶

a. We begin with the statutory language. As frequently reiterated in the briefs, the critical final sentence of Section 706(g) provides:

No order of the court shall require * * * the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual * * * was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

The plain meaning of this provision, as we contended in our brief in *Vanguards* (at 8), is that a court, upon finding that an employer has engaged in unlawful employment discrimination, may order such affirmative relief as is necessary to make victims whole but may not award relief to individuals whose rights under Title VII were not violated.

In an effort to escape this interpretation the City and State and their supporting amici, relying expressly on the analysis adopted by the dissenting opinion in *Stotts*, contend that Section 706(g) applies only to individual, make-whole relief and does not govern prospective relief to a class. See State Br. 47-61; City Br. 32-39. This argument, however, has multiple flaws.

First, as we explained in our opening brief (at 27-29), *Stotts* itself outlawed precisely the type of prospective, class-based remedy—there, a layoff quota—that the City and State maintain was somehow untouched by that opinion's discussion of Section 706(g), in a discussion that focuses almost exclusively on the impermissibility of race-conscious quota remedies (see slip op. 13-20). The district

⁶ While we do not elaborate here on the unconstitutionality of a court order requiring racial preferences for nonvictims, the Court will face that question only if it decides that Title VII or the contempt power authorizes the instant order. We refer the Court to our brief in *Wygant* for our position on this issue.

court order invalidated in *Stotts* required that the City, in the future, "not apply the seniority policy insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed" (see *id.* at 4). Accordingly, the quota order in *Stotts*, like the quota and fund order here, operated prospectively and did not provide a benefit to any "particular individual." Thus, *Stotts* cannot be distinguished on the basis that the relief granted here is somehow different.

Moreover even if *Stotts* were not binding precedent on this point, the distinction between prospective and retrospective relief is inconsistent not only with the language of Section 706(g), but also with common sense because it would provide greater remedial benefits to nondiscriminatees than to discriminatees (see opening brief at 27-29). The same is true of any purported distinction between individual and class relief.

A class or group is made up of individuals. Thus, whatever forms of relief may not be awarded under Section 706(g) to an individual likewise may not be awarded to the individuals that make up a class or group.⁷ The invalidity of the individual/class distinction is demonstrated by applying it to the Due Process and Equal Protection Clauses, which by their terms apply only to "person[s]," not classes or groups. Under the reasoning advanced by the City and State, due process and equal protection would be protected for any person who sued to protect his rights but could be freely denied to the members of classes or groups. Similarly, if Title VII requirements concerning individuals do not obtain with respect to groups of individuals, then no class-based liability is possible under that statute because Title VII substan-

⁷ The State's reading of Section 706(g) as permitting greater relief for groups than for individuals would turn the principle underlying Title VII antidiscrimination provisions on its head. See, e.g., *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) (Title VII's "focus on the individual is unambiguous"); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983).

tive provisions speak exclusively in terms of "individuals." See Section 703(a)-(e), 42 U.S.C. 2000e-2(a)-(e).

The distinction between individual and class relief also makes no sense whatsoever as a matter of policy, and thus no one has suggested any plausible explanation why Congress would have drawn such a line. In view of the fact that Section 706(g) concededly restricts the relief that may be awarded to an individual who brings suit and succeeds in establishing that he is the actual victim of discrimination, what conceivable justification can there be for allowing greater relief for individual class members who have not suffered any discrimination? Certainly it is not the purpose of Section 706(g) to penalize victims and reward non-victims nor to discourage individual suits.

Contrary to assertions by the City and State, neither *Teamsters* nor any other pre-*Stotts* opinion by this Court supports the notion that class-based prospective relief to non-victims is permissible under Title VII. To be sure, this Court has frequently stated that the purpose of Title VII judicial relief is not simply to compensate victims of discrimination, but also to prospectively "bar like discrimination in the future." *Teamsters v. United States*, 431 U.S. 324, 364 (1977), quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). See also *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770-771 (1976); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 250 (1982) (Blackmun, J., dissenting). Such preventive relief obviously inures to the benefit of all future and incumbent employees, including nondiscriminatees. But such relief is fully consistent with the remedial limitations of Section 706(g) because it does not fall within the category of relief—"make-whole" preferences—covered by the last sentence of that Section. By contrast, judicial injunctions which grant tangible employment benefits to non-discriminatees in preference to third parties are expressly governed by Section 706(g) and therefore are invalid, regardless of whether these benefits are labeled prospective or retrospective and whether they purportedly serve a "preventive" or compensatory function.

Accordingly, this Court's recognition of the dual remedial purposes of Title VII and its authorization of prospective relief to prevent future violations hardly supports the prospective use of quota relief or other preferential devices. Rather, all the cases relied upon by opposing respondents simply state the obvious proposition that injunctive relief which, unlike quotas or other preferential measures, is designed to eradicate future discrimination is an essential element of a Title VII relief package. The "prospective relief" referred to in *Teamsters*, for example, was solely nonpreferential preventive measures such as "an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any order 'necessary to ensure the full enjoyment of the rights' protected by Title VII" (431 U.S. at 361 (citation and footnote omitted)). As examples of the latter category of prospective relief, this Court cited orders designed to "prevent the deterrence of future applicants," "such as posting of job vacancies and job qualification requirements," "dissemination of information," and "public recruitment and advertis[ement]" (*id.* at 365-366 n.51). Thus, the *Teamsters* opinion's acknowledgement that nondiscriminatory, preventive relief is authorized does not in any way suggest that any order expressly barred by the last sentence of Section 706(g) could nevertheless have "prospective" effect. To the contrary, *Teamsters*, as well as *Franks*, make clear that such preferential, make-whole measures may be granted only to victims of discrimination (see opening brief, page 28 n.28; U.S. Br. 6-30 in *Local No. 93, International Association of Firefighters v. City of Cleveland*, cert. granted, No. 84-1979 (Oct. 7, 1985)). Indeed, if the *Teamsters* Court intended that such affirmative preferential relief could be granted to nondiscriminatees, it surely would not have required that the district court on remand go through the exercise of identifying those class members who were "actual victims of the company's discriminatory practices" (431 U.S. at 371-372).

Finally, there is no merit to the argument, advanced by the State (Br. 48) and amici NAACP Legal Defense and Education Funds, Inc., et al. (NAACP Am. Br. 34), that the final sentence of Section 706(g) does not apply when a court awards benefits such as hiring or advancement to individuals *who were never denied those benefits*. Whatever support this interpretation may find in a woodenly literal reading of the statutory language, this interpretation draws an irrational line that Congress could not have intended. For example, under this interpretation of Section 706(g), if Mr. Jones was denied promotion for a nondiscriminatory reason (*e.g.*, lack of seniority under a bona fide system), a court could not order his promotion for the purpose of achieving a prescribed racial balance. But if Mr. Smith did not even bother to seek promotion because he had even less seniority, Section 706(g) would not bar a court from ordering that he be promoted to satisfy a quota. Clearly such inconsistent results make no sense. Rather, the only intelligible interpretation of the sentence is that "not even a Court . . . could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." *Stotts*, slip op. 18 (emphasis added), quoting 110 Cong. Rec. 14465 (1964).

b. Opposing respondents and their supporting amici have also failed to explain away the legislative history of the 1964 Civil Rights Act, which unmistakably reveals Congress's opposition to court-ordered quota relief. Indeed, the City of New York states (Br. 29 (emphasis added)) that it "is opposed, as a matter of public policy, to the use of racial employment quotas, or goals, which if coupled with sanctions and timetables, are the functional equivalent of quotas." Accordingly, the City refuses to defend the 29.23% membership "goal," leaving the State as the only respondent willing to support this remedial provision. But even the State concedes that the 1964

Congress intended that Title VII not be interpreted (Br. 50-51 (emphasis in original; footnotes omitted))

to impose liability for a failure to adopt a quota or for racial imbalance without more, to require employers to hire particular individuals who had not been subject to discrimination, to authorize the EEOC or the courts to require employers to attain racial balance irrespective of past discrimination, or to impose *permanent* quotas to remedy proven discrimination.

Two principal points must be noted about the State's analysis. First, it is not an accurate description of the relevant legislative history, which we have recounted in our brief in *Vanguards* (at 9-11) and thus do not reiterate here. Second, since Congress was concedely opposed to the concept of racial preferences in all of the contexts noted by the State, at least a presumptive case is built that Congress was opposed to the *general principle* of racial preferences. Accordingly, the State's concessions logically place upon it the burden of showing that, notwithstanding the general congressional antipathy toward quotas, Congress wished to allow the sort of measures at issue in this case—i.e., the 29.23% membership requirement and the apprenticeship fund programs that are restricted exclusively to minority members. This the State cannot even begin to do.

In the first place, although the State and supporting amici describe the measures at issue here as goals, those measures are quotas if ever there were quotas.⁹ A quota,

⁹ In the opinion below, the only hint of a reason for calling the 29.23% membership requirement a goal is the distinction made by the court of appeals in *Rios v. Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974). In that case, the court applied the "quota" label to requirements that specified levels of minority requirements be permanently maintained rather than achieved by a particular time. *Id.* at 628 n.3. But, as we have seen, this was not a distinction that motivated the expressions of approval of some congressmen for nonmandatory and nondiscriminatory "goals."

we are told in the amicus brief (at 6-8) endorsed by the NAACP Legal Defense and Education Fund and other groups, is "a rigid prescribed distribution of benefits and opportunities," whereas a "goal" is "flexible, can be adjusted if unrealistic and require[s] only a good faith effort * * * to obtain appropriate representation." But there can be no doubt that the 29.23% membership goal and the 100% minority requirement associated with the fund programs are quotas when tested by these standards. It must be remembered that this is not a requirement that 29.23% of new *admittees* be nonwhites. It is a more sweeping and onerous requirement that the union alter its total membership so as to become 29.23% nonwhite no later than August 31, 1987. Pet. App. A46.⁹ The union in this case was told that it "*must*" achieve the 29.23% "goal" on the pain of fines that would threaten its very existence (Pet. App. A123).¹⁰ That command can hardly be characterized as "flexible" and it calls for something much more specific than "a good faith effort."

⁹ Therefore, compliance with the 29.23% "goal," depending on economic conditions, might well require a 100% nonwhite quota on admissions and even the expulsion of innocent nonwhites from the union. While data in the record is not recent, it illustrates the problem. As of the end of 1980, Local 28 had 1720 members, 152 of whom were nonwhite (J.A. 48). Between 1977 and 1980, the average yearly number of people included in the apprenticeship program was approximately 221 (see J.A. 96). Assuming that Local 28's current membership and racial breakdown approximate the figures for the beginning of 1981, and yearly admissions to its apprentice program average 221 per year until August 31, 1987, not even a 100% nonwhite apprenticeship admissions quota would ensure achievement of the 29.23% "goal," barring retirement or expulsion of significant numbers of nonwhites from the Union. Although we are unaware of more recent figures in the record, no matter what such figures reflect, the point remains that the 29.23% "goal" is a quota for alteration of the union's racial composition and requires that much more than 29.23% of new admissions be nonwhite.

¹⁰ See also Pet. App. A54, A55, A220, A232, A305.

The apprenticeship fund devoted exclusively for the benefit of nonwhites is no more flexible. How can this requirement that not one single white person be admitted to the fund's program be termed "flexible"? What does "a good faith effort" mean in this context? That the union will not be held in contempt if despite its best efforts a white person somehow manages to benefit from the program?

In any event, whether these measures are termed "quotas" or "goals," they are plainly not the kind of voluntary, flexible "affirmative action" program that some congressmen regarded as permissible in the legislative history cited by the State (*e.g.*, State Br. 58-61). In fact, much of this legislative history on which the State relies is of no relevance to Section 706(g) at all; it merely refers to the practices of contractors under the "Philadelphia Plan," not the scope of judicial remedies under Title VII. In any case, to the extent that some members may have expressed approval of programs such as the Philadelphia Plan, their support was premised on their understanding that "the plan does not require, nor does it allow discriminatory hiring practices * * *. Instead, the plan establishes a range of desirable hiring within which the contractor must set his goal" (115 Cong. Rec. 40905 (1969) (remarks of Rep. Bow), quoted at State Br. 60 n.46). In a portion of Representative Bow's statement that the State omits, he went on to emphasize that "there is no magic in these numbers or percentages" and that the plan only requires "a good faith, but lawful effort to meet" goals the contractor has chosen for himself (*ibid.*). Other congressmen similarly emphasized that the plan created no enforceable obligation that employers discriminate nor any firm requirement that they reach their goals. See, *e.g.*, 115 Cong. Rec. 40915 (1969) (remarks of Rep. MacGregor) (the plan "shall not be used to discriminate against any qualified applicant or employee" and "the goals set forth pursuant to the Philadelphia plan are not absolute"); *id.* at 40743 (Sen.

Percy) ("the plan is not coercive"). None of the congressmen supporting the plan suggested that it contained an enforceable requirement for any level of minority hiring or percentage of minorities on the job. See, *e.g.*, *id.* at 40916 (Rep. Rhodes); *id.* at 40917 (Rep. Hawkins); *id.* at 40919 (Rep. Ryan). On the contrary, those representatives who viewed the Philadelphia Plan as permissible in 1969 did so precisely because they understood the plan to lack the enforceable numerical requirements characteristic of the 29.23% requirement imposed by the court in this case.¹¹

c. We come next to the 1972 amendments of Section 706(g), which loom large in the arguments of opposing respondents and their amici. We addressed the 1972 amendment at some length in our brief in *Vanguards* (at 11-14), and nothing said by the State or its supporting amici undermines our argument. Although in 1972 Congress added language to Section 706(g) generally allowing a Title VII court to award "any * * * equitable relief as the court deems appropriate," this amendment has no bearing on the present case. Opposing respondents concede, as they must, that the final sentence of Section 706(g), which was left unchanged in 1972, imposes *some limits* on the equitable powers of a Title VII court. In other words, they concede that the language added in 1972 is qualified by whatever limitations are imposed by the final sentence of Section 706(g). Thus, the 1972 amendment is not relevant for present purposes, and the only relevant question is whether the measures at issue here are or are not consistent with the final sentence of Section 706(g).

¹¹ We do not argue that these congressmen were correct in their assumption that the Philadelphia Plan was permissible. Nor do we attach any degree of significance to post hoc legislative interpretations of the legality of the plan made by a handful of members of Congress. Our point is that even the congressional "evidence" the State cites in support of the plan was premised on the absence of the mandatory characteristics of the absolute, finely calibrated 29.23% quota involved in this case.

Beyond its reliance on the 1972 amendment, the State rests on a section-by-section analysis of the 1972 amendments which stated that "in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII" (118 Cong. Rec. 7166 (1972)). The City and State conclude that the 1972 amendment of Section 706(g), together with Congress's failure legislatively to overrule case law permitting class-based relief, evinces an intent to permit class-based prospective relief under Section 706(g).

This precise argument was considered and expressly rejected by the majority in *Stotts*. By the time *Stotts* was decided, the Court had, moreover, "already rejected * * * the contention that Congress intended to codify all existing Title VII decisions when it made [the] brief statement" on which the City and State rely so heavily (slip op. 18-19 n.15 (citing *Teamsters v. United States*, 431 U.S. at 354 n.39)). The *Stotts* Court added that the statement, which referred only to unamended sections of Title VII, "cannot serve as a basis for discerning the effect of the changes that were made by the amendment" (*ibid.*). Most important in this Court's view and in ours, the sponsors' explanation of the purposes of the 1972 amendments reaffirmed that the "scope of relief under * * * section [706(g)] of the Act is intended to make unlawful victims of discrimination whole" (118 Cong. Rec. 7168 (1972)). Thus, in rejecting the argument offered by respondents in *Stotts* and repeated by respondents in this case, the Court concluded (slip op. 18-19 n.15 (emphasis in original)):

As we noted in *Franks [v. Bowman Transportation Co.]*, 424 U.S. 747, 764 (1976), the 1972 amendments evidence "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination.

The State also relies on Congress's failure in 1972 to adopt certain anti-quota amendments. As we explained in our brief in *Vanguards* (at 12-13), we do not understand how the *failure* to amend a statute can change its meaning. Moreover, as we demonstrated in that brief, despite contrary statements by one or two *opponents* of these proposed amendments, the amendments were irrelevant to Section 706(g)'s victim-specific limitations on the remedial authority of the courts (Br. 13-14 n.10).¹² And to the extent that there was "spirited debate" regarding the meaning of Section 706(g) (City Br. 39), as we have seen, that debate was resolved so as to maintain the intention that the "scope of relief under that section of the Act is * * * to make unlawful victims of discrimination whole" (118 Cong. Rec. 7168 (1972) (explanation of sponsors)).

Furthermore, the statements in the 1972 legislative history to which the State refers reinforce the conclusion that the 29.23% requirement would have been regarded by the cited members of Congress as a prohibited, mandatory quota. For example, in the statement by Representative Hawkins cited in the State's brief (Br. 59), he did discuss quotas but he was of the view that Title VII already prohibited mandatory quotas. Thus ~~he~~ concluded (117 Cong. Rec. 31965 (1971)) that "when we talk of prohibiting quotas and talk of preferential treatment, we are merely reflecting what is in present law". Again, there is no suggestion in any of the legislative his-

¹² For that reason, this Court's reasoning in rejecting a far stronger claim of congressional approval of pre-1972 judicial interpretations of Section 703(h) applies with greater force here (*Teamsters*, 431 U.S. at 354 n.39):

[T]he section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, * * * are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls.

tory cited by the State that a quota may be saved merely by calling it a "goal." Congress fully understood that Title VII prohibited mandatory levels of minority representation and preferential treatment. A remedial provision with such characteristics cannot be saved by labeling it a "goal."

e. Finally, the State suggests that quotas are necessary to prevent future discrimination and redress the effects of discrimination. While such arguments are more properly directed at the branch of government that is responsible for amending, rather than interpreting, Title VII, we note that this argument fails even on its own terms.

First, quotas are neither designed nor necessary to prevent future discrimination. Rather, quotas require that a particular percentage of a certain racial group be afforded the relevant employment benefit without regard to whether such persons would receive that benefit under a wholly nondiscriminatory employment system. Indeed, far from preventing future racial discrimination, quota remedies ensure it by retaining race as a permissible selection criterion.

In any event, such discriminatory devices are surely not necessary to preclude continued discrimination. A whole arsenal of other remedies is available to end discrimination; the appointment of the administrator in the present case is just one example of the innovative approaches that may be employed. Unlike quotas, this kind of relief is truly directed at fulfilling Title VII's purpose of "achiev[ing] equal employment opportunity and . . . remov[ing] the barriers that have operated to favor white male employees over other employees." *Teamsters*, 431 U.S. at 364-365. Furthermore, here, when a party such as petitioners contemptuously flouts the Title VII orders of a court, we support the imposition of the strongest possible coercive measures directed against those responsible for the disobedience of the court's orders. Traditional contempt sanctions are effective in all other areas of the law, and we can perceive no reason why they cannot be made to work here as well.

Nor do quotas in any way enable courts to redress more fully the effects of past discrimination. The restoration of all identifiable discriminatees to their rightful places in the employer's work force, in combination with the prophylactic enforcement measures described above, will remedy to the fullest extent possible all of the effects of the employer's unlawful discrimination. The State, however, points out that the effort to identify and make whole all victims of the employer's discriminatory practices will rarely be 100% successful. While the inherent limitations of the judicial process may well have this unfortunate result, a quota remedy in no way addresses—let alone solves—this problem. The injury suffered by a discriminatee who cannot be located is in no way ameliorated—much less remedied—by conferring preferential treatment on other, randomly selected members of his race who are strangers to the employer's past discrimination. A person suffering from appendicitis is not relieved of his pain by an appendectomy performed on a patient in the next room.

Accordingly, there is simply nothing *remedial* about preferring an individual whose *personal* statutory right to nondiscriminatory treatment has in no way been infringed solely because that individual is a member of the same racial group as others who were so victimized. And, of course, according such preferential treatment to persons who have no claim to a "rightful place" in the employer's workforce necessarily deprives innocent third parties of *their* "rightful place."

In sum, since quotas serve neither a preventive nor compensatory function, and since Title VII does not grant any substantive right to a particular racial balance in an employer's workforce (see Section 703(j)), such racially preferential devices do not further any purpose of Title VII. Accordingly, even had Congress not expressly prohibited quotas as a remedial tool, they would in any event be impermissibly at odds with basic remedial and equitable principles.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the decision of the court of appeals should be affirmed in part and reversed in part and the case remanded for the entry of appropriate relief.

Respectfully submitted.

CHARLES FRIED

Solicitor General

WM. BRADFORD REYNOLDS

Assistant Attorney General

CAROLYN B. KUHL

Deputy Solicitor General

MICHAEL CARVIN

Deputy Assistant Attorney General

SAMUEL A. ALITO, JR.

Acting Assistant to the Solicitor General

BRIAN K. LANDSBERG

DENNIS J. DIMSEY

DAVID K. FLYNN

Attorneys

JOHNNY J. BUTLER

Acting General Counsel

Equal Employment Opportunity Commission

FEBRUARY 1986

AMICUS CURIAE

BRIEF

NOTION FILED
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No. 84-1656

In The
Supreme Court of the United States
October Term, 1985

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LOCAL 638, LOCAL 28 OF THE SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION,
LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMIS-
SION, THE CITY OF NEW YORK, AND NEW YORK
STATE DIVISION OF HUMAN RIGHTS,
Respondents.

o

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

o

**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE AND BRIEF
AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONERS**

o

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154
*Attorneys for Amicus Curiae,
Pacific Legal Foundation*

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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No. 84-1656

In The
Supreme Court of the United States
October Term, 1985

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WORKERS' INTERNATIONAL ASSOCIATION,
LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMIS-
SION, THE CITY OF NEW YORK, AND NEW YORK
STATE DIVISION OF HUMAN RIGHTS,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONERS**

This motion of Pacific Legal Foundation to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. Counsel for petitioners, Local 638, *et al.*, and respondents, Equal Employment Opportunity Commission and the City of New York, have consented to the filing of this brief and these consents have been lodged with the clerk of this Court. Consent has been withheld by counsel for the New York State Division of Human Rights.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for

the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

It is Pacific Legal Foundation's position that the purpose of American civil rights law is to compensate victims of discrimination and punish those who discriminate; the remedy ordered in this case does neither. Instead, the Second Circuit's decision punishes innocent nonminority job seekers while doing nothing to compensate the actual victims of discrimination.

Pacific Legal Foundation has participated in numerous cases which involved issues similar to that presented in this matter. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in light of the erroneous holding of the Second Circuit Court of Appeals in this matter.

For the foregoing reasons, Pacific Legal Foundation requests that the motion to file the annexed brief amicus curiae be granted.

DATED: November, 1985.

Respectfully submitted,
RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD

By _____
JOHN H. FINDLEY
*Attorneys for Amicus Curiae,
Pacific Legal Foundation*

No. 84-1656

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—o—
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—o—

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONERS**

—o—
INTEREST OF AMICUS

The interest of amicus is set forth in the preceding
motion for leave to file this brief.

—o—
OPINION BELOW

The opinion of the United States Court of Appeals
for the Second Circuit is reported at 753 F.2d 1172 (2d
Cir. 1985).

STATEMENT OF THE CASE

This case presents the issue whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States tolerate race preference in the form of inflexible quotas.

The issue arose when the United States District Court for the Southern District of New York held petitioner union and its Joint Apprenticeship Committee (JAC) to be in contempt of a 29% nonwhite membership goal ordered in response to a Title VII action brought by the United States Equal Employment Opportunity Commission (EEOC), the New York State Division of Human Rights, and the City of New York. The order also included a court-appointed administrator who governs the union with respect to the program on a daily basis at the union's expense. The administrator approved the size of each class of apprentices which is the major entry point into the industry. These classes each consisted of approximately 45% persons of minority extraction.

From 1977 to 1982 was a period of extreme economic distress for the sheet metal industry. Yet the total nonwhite membership in Local 28 increased from 6.1% to 14.9% while the total membership declined. Even though the court-appointed administrator approved the union's efforts to meet the goal established in the court-ordered plan, the union and JAC were found to be in contempt, largely for their failure to comply with the ministerial provisions of the program. At the last contempt proceeding, a revised affirmative action program was ordered in

which earlier fines and penalties were to fund an education, training, counseling, and financial assistance program to be used exclusively for nonwhites and a new quota, termed "goal," was established requiring a 29.23% nonwhite membership by August 31, 1987. The new mathematical goal is the result of several unions merging into Local 28.

The petitioners in this action argued below that the required new percentage of nonwhite members into the union constituted a race-conscious quota which totally disregards individual circumstances and burdens both minority and nonminority races rather than a permissible goal in an affirmative action program, *Local 638*, 753 F.2d at 1185-86. It is thus illegal under Title VII and the Equal Protection Clause of the Fourteenth Amendment.

The Court of Appeals affirmed findings of contempt against Local 28 and JAC including the creation of the fund to benefit only nonwhites and the 29.23% nonwhite membership "goal." The court did not affirm the finding of the lower court concerning an older worker's provision which the court held could not be a basis for contempt because it was never instituted.

Judge Winter in dissent argued that the lower court had transformed the 29% figure from a goal guiding the administrator in his decision, to one of an inflexible racial quota. *Local 638*, 753 F.2d at 1189.

SUMMARY OF ARGUMENT

This case presents a portion of the question left unresolved in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 81 L. Ed. 2d 483 (1984). It involves the issue of whether an affirmative action plan, enacted by a governmental entity that grants racially based preferences, violates the Fourteenth Amendment and the Federal Civil Rights Act.

The key to the validity of such affirmative action plans lies in the adequacy of the findings necessary to support the plan and precludes race-conscious quotas as a judicial remedy under Title VII and the Fourteenth Amendment. If allowed, it would result in burdening some minority members as well as members of the majority without reasonably advancing racial equality and integration. The Fourteenth Amendment protects individual rights and does not countenance group preference merely to obtain racial balance.

ARGUMENT

I

ABSENT ADEQUATE FINDINGS OF PAST DISCRIMINATION A RACE-CONSCIOUS QUOTA VIOLATES TITLE VII

The District Court in this case established a rigid membership quota of 29.23%, the effect of which is to keep certain nonminority persons out of petitioner union solely on account of their race or ethnic background. This reverse discrimination contradicts the basic assumption of

Title VII that individuals are to be judged as individuals, not as members of particular racial groups. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

The purpose of Title VII is to prevent discrimination and achieve equal employment opportunity in the future and to make whole victims of past discrimination. See, e.g., *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). Title VII prohibits preferential treatment in hiring practices to correct racial imbalance. It leaves to the courts much discretion in forming affirmative action programs and the use of mathematical membership goals has been occasionally affirmed when the court found a clear-cut pattern of long-continued and egregious racial discrimination and no showing of identifiable reverse discrimination. *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975), *reh'g en banc denied*, 531 F.2d 5.

In this case, the District Court found the union and JAC to be in contempt for failing to meet the minority membership goal of 29% required by July, 1981, because the union and JAC (1) underutilized the apprenticeship program, (2) refused to conduct a general publicity campaign ordered in the Revised Affirmative Action Program and Order (RAAPO), (3) adopted a job protection provision in their collective bargaining agreement that favored older workers who were predominantly white and, thus, discriminated against nonwhite (reversed by the Court of Appeals because it was never implemented), (4) issued unauthorized work permits to white workers from sister locals, and (5) failed to maintain and submit records and

reports. 753 F.2d at 1177. The court imposed a fine of \$150,000.

At a second contempt proceeding before the administrator, and affirmed by the Second Circuit, the union and JAC were charged with violating certain ministerial provisions of the RAAPO which included (1) failure to provide required records, (2) failure to provide adequate data, and (3) failure to serve the Order and Judgment and RAAPO on contractors who hired Local 28 members. 753 F.2d at 1177. As a result of the second contempt proceeding the District Court established the employment, training, education, and recruitment program to be funded by the fine imposed in the first contempt proceeding. The District Court also established a nonwhite membership goal of 29.23% to be achieved by July 31, 1987. 753 F.2d 1177-78. No act of racial discrimination was alleged in the second contempt proceeding nor were there identified victims. The contempt proceedings were clearly premised on the failure to meet the requisite percentages of minority membership, which was treated as a "quota."

The Court of Appeals in affirming the District Court stated:

"Finally, we believe that defendants' attempt to rely on *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S. Ct. 2576, 81 L.Ed.2d 483 (1984), is misplaced. Defendants argue that *Stotts* eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination. We do not accept defendants' expansive interpretation of that opinion." 753 F.2d at 1185.

As Judge Winter argued in his dissent: "This holding transforms the 29% figure from a goal guiding the administrator's decisions into an inflexible racial quota."

753 F.2d at 1189. It is amicus' position that the court-imposed racial quota runs afoul of the *Stotts* requirement for a race-conscious affirmative action program.

In *Stotts*, a black fireman filed a class action alleging that the Memphis Fire Department was violating Title VII by making its hiring and promotion decisions on the basis of race. Pursuant to a consent decree, the City of Memphis adopted a goal of increasing the percentage of black firemen until it approximated the percentage of blacks in the Memphis area's labor force. When fiscal conditioning required firefighter layoffs the District Court enjoined the city from making the layoffs solely on the basis of seniority if this would reduce the percentage of black fire fighters.

This Court overturned the injunction and stated that individual members of a plaintiff class must demonstrate that they have been actual victims of the discriminatory practice before being awarded competitive seniority. *Stotts*, 81 L. Ed. 2d at 499. The Court in essence held that Title VII does not permit affirmative action plans to be based on racial preference which would benefit employees who were not "actual victims" of discrimination. The *Stotts* holding is consistent with prior decisions. This Court has never approved race-conscious remedies in the absence of judicial, administrative, or legislative findings of discrimination in violation of the Constitution or statutes. *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (opinion of Powell, J.); *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). The existence of findings of illegal discrimination is therefore a precondition to the adoption of a preferential affirmative action plan.

Amicus submits that *Stotts* is controlling in this case. *Stotts* requires that where an affirmative action plan distributes benefits or abrogates rights, it must pursue a compelling state interest, identified by direct findings of discrimination. The plan must also pursue compelling state interests by the most narrowly tailored means. *Stotts* should be applied to this case because the government established a preferential affirmative action plan which became racial discrimination when the court distributed benefits under a quota system which totally disregarded individual circumstances and without direct findings of discrimination.¹

Preferential treatment plans pose the threat that placing individuals in nonpreferred classifications may violate their civil rights. Such plans must contain some protections to ensure that the application of the racial criteria will be limited to accomplishing the remedial objectives of the plan as well as to ensure that misapplications of the plan will be promptly and adequately remedied. See *Fullilove v. Klutznick*, 448 U.S. at 487. The objectives are directly founded upon the scope of the identified discrimination and the safeguards in the plan must thus be derived from a studied consideration of the findings.

A governmental entity cannot, therefore, develop a racially conscious affirmative action plan without first establishing findings that clearly define the scope and duration of the discrimination sought to be remedied. The

¹ The only allegation which might have justified the contempt finding was the underutilization of the apprenticeship program over which the court-appointed administrator had control. The finding of underutilization was based in part on an erroneous statistical analysis. 753 F.2d at 1180.

entity cannot determine the recipients of the preference nor the extent of the remedy without such findings. Nor can the governmental entity devise adequate safeguards to protect the rights of those disfavored by the classifications without defining the extent of the discrimination. A court reviewing a preferential plan cannot perform the detailed analysis necessary to determine if the plan is permissible unless it is presented with the detailed findings that prompted the adoption of the plan.

As this Court held in *In re Griffiths*, 413 U.S. 717, 721 n.8 (1973): "Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose." And more specifically, "quotas merely to attain racial balance are forbidden." *United States v. Wood, Wire and Metal Lathers International Union, Local Union No. 46*, 471 F.2d 408, 413 (2d Cir. 1973).

Yet a race-conscious quota is precisely what the District Court imposed on the union and JAC. It transformed the goal guiding the court-appointed administrator's decisions into a race-conscious quota.

The Court of Appeals in affirming the District Court rejected the guidance of this Court in *Stotts*, 81 L. Ed. 2d 483. Here, the court forced a race-conscious quota and a race-conscious fund upon the union and JAC without adequate safeguards, no further showing of discrimination, and no identifiable victims. The race-conscious quota creates a totally arbitrary program resulting in burdening nonminorities without reasonably advancing racial equality and thereby violates Title VII.

II

QUOTAS IMPOSED FOR RACIAL BALANCE VIOLATE THE FOURTEENTH AMENDMENT

Because this lawsuit is in part brought by the New York State Division of Human Rights and the City of New York it constitutes state action subject to the Fourteenth Amendment to the United States Constitution. That amendment provides in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." This clause requires as a constitutional guarantee that individuals be treated in a manner similar to others and governs all governmental actions which classify individuals for different burdens or benefits under the law. The Fifth Amendment provides similar protection against entities of the federal government such as EEOC. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

This Court has traditionally repudiated distinctions between citizens solely on the basis of their ancestry as being "'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Bakke*, 438 U.S. at 294 (opinion of Powell), quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967), and *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Therefore, a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). The sources of the justification must rest in the discrimination sought to be corrected by the classification.

The goals of racial equality and integration of minorities into the economic mainstream are laudable. The objections to "benign" discrimination programs have been

directed at the means used: racial preferences and race-conscious quotas. This creates an apparent conflict between the removal of any remaining barriers to full racial equality and the requirement that the government treat individuals on the basis of their personal merit rather than their race.

For a government-imposed affirmative action program to be constitutional, it must not violate the Equal Protection Clause of the Fourteenth Amendment. Justice Powell urges that the standard to be applied under the Fourteenth Amendment is strict scrutiny. *Bakke*, 438 U.S. at 361. The divergent opinions of this Court in *Bakke*, *Fullilove v. Klutznick*, 448 U.S. 448, and their progeny indicate that the Court has not yet determined what is the appropriate test to be applied when reviewing racially conscious affirmative action plans. Justice Powell advocates that the test should be one of compelling state interest and whether the "program's racial classification is necessary to promote this interest." *Bakke*, 438 U.S. at 315-16. He further states that strict racial quotas and strict racial preferences constitute unconstitutional reverse discrimination and violate the Civil Rights Act of 1964 unless tailored to make whole identified victims of past discrimination.

This is the view that must be taken of the Fourteenth Amendment, for discrimination is always personal and individual to the person who suffers it. It is of no consolation to that person to know his or her race as a whole may or may not have been subject to deprivations at other times in other places. What the individual of any race demands and deserves is equal protection from discrimination, here and now.

CONCLUSION

When the government distributes benefits under a race-conscious quota, it rejects the concern for the individual that forms the basis for a free society. Such quotas make members of favored classes eligible for preferential treatment regardless of whether they personally have been disadvantaged by racial discrimination; at the same time quotas in their arbitrariness exclude others who may have been subject to equally onerous burdens.

In *Mitchell v. United States*, 313 U.S. 80, 97 (1941), this Court declared: "It is the individual . . . who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers."

The replacement of individual rights and opportunities by a program based on race-conscious quotas is inconsistent with a society dedicated to equal opportunity. Amicus, Pacific Legal Foundation, therefore, urges that the decision of the Second Circuit be reversed.

DATED: November, 1985

Respectfully submitted,

RONALD A. ZUMBRUN

JOHN H. FINDLEY

COUNSEL OF RECORD

Pacific Legal Foundation

555 Capitol Mall, Suite 350

Sacramento, California 95814

Telephone: (916) 444-0154

*Attorneys for Amicus Curiae,
Pacific Legal Foundation*

AMICUS CURIAE

BRIEF

DEC 2 1985

W. F. SPANIOLO
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts
of Appeals for the Second and Sixth Circuits

BRIEF OF LOCAL 542, INTERNATIONAL UNION
OF OPERATING ENGINEERS AND LOCAL 36,
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,
AFL-CIO, AS AMICI CURIAE
IN SUPPORT OF PETITIONERS

Of Counsel:

EDWARD D. FOY, JR.

LIEDERBACH, ROSSI, HAHN,
& FOY

892 Second Street Pike
Richboro, PA 19854

*Attorney for Amicus Local 542,
International Union of
Operating Engineers*

GEORGE H. COHEN

BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300

Washington, D.C. 20036

*Attorney for Amicus Local 36,
International Association
of Firefighters*

ROBERT M. WEINBERG *

MICHAEL H. GOTTESMAN

JEREMIAH A. COLLINS

BREDHOFF & KAISER

1000 Connecticut Ave., N.W.
Suite 1300

Washington, D.C. 20036
(202) 833-9340

*Attorneys for Amici Local 542,
International Union of
Operating Engineers and
Local 36, International
Association of Firefighters*

* Counsel of Record

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**BRIEF OF LOCAL 542, INTERNATIONAL UNION
OF OPERATING ENGINEERS AND LOCAL 36,
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,
AFL-CIO, AS AMICI CURIAE
IN SUPPORT OF PETITIONERS**

INTEREST OF THE AMICI CURIAE

Local 542, International Union of Operating Engineers, is the exclusive bargaining representative for all unionized operating engineers in Eastern Pennsylvania and Delaware. Local 36, International Association of Firefighters, AFL-CIO, is the exclusive bargaining representative for all members of the uniformed force of the District of Columbia Fire Department in the ranks of Firefighter through Captain. Each of these amici is presently involved in litigation concerning the legitimacy of court-ordered or governmentally imposed racial quotas in the employment context. See *Local Union 542, International Union of Operating Engineers v. Commonwealth of Pennsylvania, et al.*, pet. for cert. pending, No. 85-828; *Hammon v. Barry*, 606 F. Supp. 1082 (D.D.C. 1985). The principles by which this Court decides the instant cases may well determine the validity or invalidity of the racial quotas at issue in amici's cases. Amici file this brief amici curiae with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses only the question whether courts are authorized to order racial quotas as remedies for employment discrimination found to violate Title VII of the Civil Rights Act of 1964 or 42 U.S.C. §§ 1981 or 1983.¹ More specifically, the question is whether under

¹ The petitions in these cases do not expressly raise any question regarding the authority of courts to order racial quotas as remedies for violations of §§ 1981 or 1983. However, in No. 84-1999 (*Local Number 93*) the complaint was premised on §§ 1981 and 1983 as well as Title VII, and presumably so was the consent decree containing the racial quotas. Accordingly, in No. 84-1999 the Court

these statutes a court may order that persons of one race be deprived of jobs, solely because of their race, in order to open those jobs to persons of another race who have not been victims of the discrimination practiced by the defendant.

This brief will examine the pertinent legislative history of Title VII and show the following: (1) In 1964, when the law was enacted, Congress expressly determined that courts would not be authorized to order racial quotas; (2) in 1972, when certain provisions of Title VII were amended, Congress exhibited full awareness of its earlier decision to prohibit court-ordered racial quotas, and determined not to alter that decision.

With respect to the remedial authority of courts in actions brought under §§ 1981 or 1983, we will show: that the post-Civil War Congress that enacted those provisions—as well as the companion provision, 42 U.S.C. § 1988—did not intend to authorize quota remedies; and that, if those provisions are to be interpreted in light of “modern law,” the judgment of Congress to prohibit court-ordered quotas under Title VII precludes courts from construing the post-Civil War statutes to reach a contrary result.

ARGUMENT

I. TITLE VII DOES NOT AUTHORIZE COURTS TO AWARD RACIAL QUOTA REMEDIES

In *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S.Ct. 2576, 2588-89 (1984), this Court stated that “the policy behind § 706(g) of Title VII . . . is to provide make-whole relief *only* to those who have been actual victims of illegal discrimination . . .” (em-

may address the validity of racial quota remedies for violations of §§ 1981 or 1983. The question of the validity of quota remedies under § 1981 is directly presented in the petition for certiorari filed by amicus Local 542 in *Local Union 542, International Union of Operating Engineers v. Commonwealth of Pennsylvania, et al.*, No. 85-828.

phasis added), and that the quota before the Court in *Stotts* “runs counter” to that policy (*id.* at 2590, n. 17). Section 706(g) is *the* provision that creates and establishes the limits of the remedial power of the courts under Title VII. There has been considerable doubt expressed in the lower courts as to whether the *Stotts* Court meant to preclude racial quotas as remedies for Title VII violations.² We do not propose here to debate what this Court intended in *Stotts*. For the question of the power of the courts to order racial quotas as remedies for Title VII violations is purely one of statutory interpretation. And, examination of the relevant legislative materials from 1964 and 1972 establishes that Congress left no doubt as to *its* intention on this question: Congress intended to preclude courts from ordering racial quota remedies in Title VII cases.

1. When Congress considered Title VII in 1964, the issue whether courts would be authorized to order racial quota remedies was expressly addressed. The sponsors of the bill in both the House and the Senate repeatedly and unequivocally confirmed that Title VII would not empower courts to order racial quota remedies.

Before the 1964 debate began, the bill’s opponents cited quota remedies as one of the evils that would be produced. See, e.g., H.R. Rep. 914, 88th Cong. 1st Sess. (1963) at 72. These opponents declared this “a not too subtle system of racism-in-reverse” (*id.* at 73).

When the bill reached the House floor, the opening speech in support of its passage was delivered by Repre-

² See, e.g., *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 770 F.2d 1068 (3d Cir. 1985) (table) (opinion published at 38 FEP Cases 673), *pet. for cert. pending*, No. 85-828; *Paradise v. Prescott*, 767 F.2d 1514, 1528-1530 (11th Cir. 1985); *Deveraux v. Geary*, 765 F.2d 268, 273 (1st Cir. 1985); *Turner v. Orr*, 759 F.2d 817, 823-824 (11th Cir. 1985), *pet. for cert. pending*, No. 85-177; *Britton v. South Bend Community School Corp.*, — F.2d —, 39 FEP Cases 170, 180-181 (7th Cir. 1985); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1360 n.9 (9th Cir. 1985) (dictum).

sentative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" that had been leveled against the bill (110 Cong. Rec. 1518):

In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against one or more of his employees because of race, religion or national origin . . .

Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination. [Ibid (emphasis added)].³

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum stated:

Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, *Title VII does not permit the ordering of racial quotas in businesses or unions and does not permit interferences with seniority rights of employees or union members. [Id. at 6566 (emphasis added)].*

When the bill was taken up by the Senate, Senators Humphrey and Kuchel, the co-managers of the entire bill, undertook a description of each of the titles. In the course of his description of Title VII, Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedial powers available to a court:

³ See also *id.* at 1600 (Rep. Minish) ("no quota system will be set up").

The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707e [enacted, without change, as § 706(g)]

* * *

Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.

That bugaboo has been brought up a dozen times; but it is nonexistent. [Id. at 6548 (emphasis added)].

Senator Kuchel made the other major opening speech in support of the bill. He, too, took pains to demonstrate that the remedial provisions would not permit court-ordered quotas:

Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to

mediate or conciliate the dispute. It would have no authority to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued by the Federal district court would, of course, be subject to appeal. *But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.* [Id. at 6563 (emphasis added)].

Senators Clark and Case were the bipartisan "captains" of Title VII in the Senate. They prepared and submitted to the Senate an interpretative memorandum⁴ which, *inter alia*, made clear that § 706(g) precluded courts from ordering preferential treatment for non-victims of discrimination:

No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section [706(g)] . . . [Id. at 7214].

Senator Clark also set before the Senate written answers he had prepared to certain "objections" which had been voiced to Title VII. To the objection that Title VII would "require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market," the answer was: "Quotas are themselves discriminatory." Id. at 7218.

Each day during the Senate debates on the Civil Rights bill, the principal Senate sponsors prepared a Bipartisan Civil Rights Newsletter which was hand-delivered to the office of each Senator supporting the bill. Its purpose,

⁴ This Court has recognized the "authoritative nature of [this] interpretative memorandum." *Stotts*, 104 S.Ct. at 2589 n.13; *American Tobacco Co. v. Patterson*, 456 U.S. 63, 73 (1982); *Teamsters v. United States*, 431 U.S. 324, 352 (1977).

as explained by Senator Humphrey, was "to keep Senators who are in favor of civil rights legislation informed of our point of view."⁵ The April 11, 1964, issue of the Newsletter declared:

Under title VII, *not even a Court*, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title. [Id. at 14465 (emphasis added)].

Senator Humphrey introduced an explanation of the House bill which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress." Id. at 11847. In pertinent part, the explanation provided:

The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay . . .

The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. . . . The Title does not provide for the reinstatement or employment of a person, with or without back pay, if he was fired or refused employment or promotion for any reason other than discrimination prohibited by the Title. [Ibid (emphasis added)].

-In addition to the materials just cited which directly and unambiguously relate to the power of courts to order racial quotas as "remedies," the 1964 legislative history is replete with more general statements by proponents of Title VII that racial quotas could not be imposed under Title VII, including numerous statements that

⁵ Id. at 5042. It is apparent from the numerous references to the Newsletter in the floor debates, that the publication was widely read by Senators. See id. at 5044, 5046, 5079, 7474, 8369, 8912, 9105, 9870, 10622, 12210, 14464.

imposition of racial quotas would run counter to the anti-discrimination principles of the statute. For the convenience of the Court, we set forth a number of these statements in an appendix to this brief. Significantly, we have not found, nor has any advocate of racial quota relief under Title VII ever cited, a single instance in the 1964 legislative history in which any supporter of Title VII suggested that Title VII would provide for or permit court-ordered racial quotas.

2. What was said and done in 1964 shows conclusively that Congress in enacting Title VII intended to provide affirmative remedies for the victims of discrimination but not quota remedies benefiting nonvictims. Nothing Congress has said or done since 1964 provides a basis for reading Title VII, as amended in 1972, differently in this regard from Title VII as originally passed. Examination of the 1972 legislative materials shows: (i) that the only arguably pertinent legislative *act* in 1972 was designed to confirm that "rightful place" relief for *victims* is the remedial objective of Title VII, and not to reverse the determination in 1964 to preclude quota remedies; and (ii) that the 1972 Congress—particularly the House—recognized that the 1964 Congress had determined to rule out quota remedies, and had no wish to alter that determination.

a. In 1972, Congress amended the first sentence of § 706(g) to add the words "but is not limited to" and "any other equitable relief as the court deems appropriate" to the specification of remedies already listed in that provision. The only explanation for that amendment is contained in the Section-by-Section Analysis that was introduced in both houses:

Section 706(g)—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, rein-

statement or hiring, with or without backpay, as will effectuate the policies of the Act. Backpay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the backpay otherwise allowable.

The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination* [118 Cong. Rec. 7166, 7168 (emphasis added)].⁶

As this Court explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 n.21 (1976), the Congress that "added the phrase speaking to 'other equitable relief' in § 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." And, the Court understood the portion of the Section-by-Section Analysis quoted above to be "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circum-

⁶ The Section-by-Section Analysis quoted in text was first submitted to the Senate by Senator Williams (the bill's floor manager in the Senate) prior to adoption of the Senate bill. Senator Williams submitted it again in conjunction with the Conference Report, as did Rep. Perkins in the House. See Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972) (hereinafter "72 Leg. Hist."), pp. xv n.3, 1769, 1773-74, 1843-44, 1848, 1856.

stances of a case may require to effect restitution, making whole insofar as possible the *victims* of racial discrimination . . ." *Id.* at 764 (emphasis added).

There is not a word in the legislative history to suggest that "other equitable relief" was added to § 706(g) to authorize quota remedies, and it is hardly conceivable that so profound a departure from the anti-quota decision made in 1964 would have been accomplished without evidence of an intention to do so.

b. Not only did the 1972 Congress take no legislative act which purported to reverse the anti-quota decision of 1964, but that Congress also manifested a recognition and an acceptance of the fact that court-ordered racial quota remedies are barred under Title VII.

That recognition and acceptance are most readily seen in the debate in the House. That debate focused on two competing bills—one (H.R. 1746) introduced by Rep. Augustus Hawkins and reported out by the House Labor Committee, and the other (H.R. 9247) offered by Rep. John Erlenborn "as an amendment in the nature of a substitute." 72 Leg. Hist. 150-151. The principal differences between the bills—and the subject of virtually all the debate—involved matters wholly irrelevant to the issue here (*e.g.*, Should the EEOC be given "cease and desist" power? Should Title VII be extended to public employment?) Insofar as relevant here, the difference between the bills was that the Committee bill proposed to transfer administration of Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC, while the Erlenborn bill did not. The proposed transfer of OFCC administration to the EEOC in the Committee bill was perceived by some as providing the EEOC with a power to order quotas, for the OFCC in its administration of the Executive Order had made it a condition to receipt of government contracts that the contractor adopt "goals and timetables." The discussion of quotas in the House in 1972 centered on the propriety of giving the EEOC

power to require quotas under the Executive Order, with all sides agreeing that quotas could not be ordered under Title VII.

In support of his position that the OFCC administration should not be transferred to the EEOC, Rep. Erlenborn stated the theory on which quotas, although not authorized under Title VII, had been treated differently under the Executive Order:

The OFCC is an altogether different type of jurisdiction [from the EEOC]. It is not based upon constitutional rights. It is not based upon statutory rights.

The genesis of the power of the OFCC is the contractual relationship that exists between the Federal Government and those with whom they contract for the acquisition of goods and services. In this jurisdiction the OFCC can and does go beyond those powers granted by the 1964 Civil Rights Act. I think it is important to note that the Chairman of the Equal Employment Opportunity Commission himself has testified that you cannot mix these two enforcement authorities. [72 Leg. Hist. at 231].

Supporters of the Committee bill did not dispute the theoretical basis for such a distinction, and they proposed to resolve the dilemma not by leaving administration of the Executive Order with the OFCC, as Rep. Erlenborn would have done, but by making Title VII's ban on quotas equally applicable to the Executive Order. Their solution—incorporated in the so-called Dent Amendment to the Committee bill—was that coincident with transfer to the EEOC of authority to enforce the Executive Order, the EEOC should be "prohibited from imposing or requiring a quot[a] or preferential treatment." 72 Leg. Hist. at 189. Rep. Dent, the floor manager of the Committee bill, explained the reason for incorporating this express prohibition:

My . . . amendment would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal

contract-compliance program. This responsibility, which is now vested in the Office of Federal Contract Compliance of the Department of Labor, would be transferred by H.R. 1746 to the Commission. *Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program.* [72 Leg. Hist. at 190 (emphasis added). See also *id.* at 199 (Rep. Perkins); *id.* at 204, 208 (Rep. Hawkins)].

While there was some debate over the propriety of exacting quotas under the Executive Order as the price for receipt of government contracts (see, e.g., *id.*, at 202, 208-209, 222-223, 231), there was unanimity that quotas were not to be imposed under Title VII. Rep. Hawkins, the author of the Committee bill, declared:

[S]ome say that this bill seeks to establish quotas . . . Not only does Title VII prohibit this, but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment. It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. [72 Leg. Hist. at 204 (emphasis added)].⁷

And Rep. Erlenborn, the author of the rival bill, correctly identified the narrow scope of the dialogue by pointing out that *neither the Committee bill nor the Erlenborn substitute "is going to repeal the prohibition against quotas that is in Title VII of the Civil Rights Act"* [*Id.* at 261 (emphasis added)].

In the end—over the opposition of those normally associated with the “liberal” position on civil rights matters, including the members of the Black Caucus⁸—the

⁷ Rep. Hawkins later repeated, during a colloquy, that Title VII already “prohibits the establishment of quotas.” *Id.* at 209.

⁸ See e.g., *id.* at 223-224 (Rep. John Conyers); *id.* at 232, 269-272 (Rep. Fauntroy); *id.* at 233-234 (Rep. Parrin Mitchell); *id.* at 274-277 (Rep. Abzug); *id.* at 299-301 (Rep. Stokes).

House voted to adopt the Erlenborn substitute. *Id.* at 312-314. As that substitute did not provide for the transfer of OFCC administration to the EEOC, there was no occasion for the House to vote on the Dent amendment, which was never formally offered, nor on any other measure respecting the propriety of quotas under Executive Order 11246. What is important here is that all parties to the debate took as given, and did not propose to change, the fact that Title VII does not authorize court-ordered racial quotas.⁹

⁹ The fact that the House debate manifests the uniform understanding that Title VII does not permit court-ordered quotas—not a surprising fact in view of the definitive resolution of that controversial issue just eight years earlier—precludes any notion that, because a few, isolated lower court cases purportedly authorizing court-ordered quotas had been decided by 1972, Congress should be deemed to have acted on the assumption that Title VII authorized such quotas.

Indeed our research has uncovered only two cases decided prior to the completion of the 1972 consideration of Title VII that even arguably approved quota remedies, and in both the approval was cryptic. In *Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), the court upheld an injunction striking down nepotism and prior experience as requirements for union membership and “ordered the development of objective membership criteria,” 407 F.2d at 1051, not racial quotas or preferences, to govern future admissions to union membership. Pending development of such objective criteria, the injunction prohibited new admissions of members (save identified discriminatees) and directed that during the interim period work referrals of existing members be made on a chronological basis, with alternating referrals of whites and blacks, *id.* In a cryptic passage near the end of its opinion, the Fifth Circuit explained that the temporary alternating referrals were required for “administrative reasons.” *Id.* at 1055. In *United States v. Iron Workers Local 86*, 443 F.2d 544, 553-554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971), the Court, relying on *Vogler*, sustained an injunction that contained compulsory numerical guidelines for minority admissions into apprentice programs, rejecting arguments that the injunction violated § 703(j). The court declared that the injunction it was affirming “did not establish a system of racial quotas or ‘preferences’ in violation of section 703(j).” 443 F.2d at 554. Thus while close reading of *Vogler* and *Ironworkers* reveals that orders establishing racial preferences were in fact approved, neither case purported to endorse court-ordered racial quotas in

While the Senate's consideration of proposed amendments was hardly more indicative of a desire to overturn the 1964 decision to prohibit quota remedies, we relegate discussion of the Senate's consideration to the margin. For given the House's clear opposition to quota remedies under Title VII, nothing the Senate might have done *alone* could have effectuated a turnaround of the 1964 decision. As this Court has recently confirmed, a congressional decision made by both houses and signed by the President may not later be overturned even by the positive action of one house, *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), and *a fortiori* cannot be found inferentially to have been overturned by rejection of proposed amendments within one house.¹⁰

Title VII cases. And there was as of 1972 case law and commentary supporting the opposite proposition, *viz.*, that quota remedies are not authorized under Title VIII. *Castro v. Beecher*, 334 F. Supp. 930, 945 (D. Mass. 1971); *Developments in the Law—Title VII*, 84 Harv. L. Rev. 1109, 1114-16 (1971).

To say the least, there was not on this issue in 1972 "established judicial precedent" "consistently and routinely" applied as there was in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385 (1983); see also, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 379 (1982) ("the federal courts routinely and consistently had recognized an implied cause of action").

¹⁰ In the Senate, there was one proposed amendment that related tangentially to the issue of court-ordered quotas. Senator Ervin, in the course of introducing numerous amendments to prolong a filibuster, introduced one prohibiting any "department, agency, or officer of the United States" from requiring employers to "practice discrimination in reverse by employing persons" in percentages or quotas on the basis of race, sex, religion or national origin (72 Leg. Hist. at 1017). This amendment, he explained, was addressed primarily to the OFCC's implementation of Executive Order 11246 to require government contractors to adopt quotas ("the Philadelphia Plan"), and secondarily to "[t]he EEOC", which "on less frequent occasions, has hailed employers before its bar to practice discrimination in reverse." (*Id.* at 1042-45.) The amendment was defeated by a vote of 44-22 (*Id.* at 1074-75).

Given the legislative dynamic in which the Ervin amendment was proposed—an ongoing filibuster that Senator Ervin was seeking to

3. It has been suggested that the last sentence of § 706(g) should be understood to be a limit on the relief available to *individuals* who are victims of unlawful discrimination but not to preclude a grant of preferential relief to a *class* of persons of the same race who are not victims. See *Stotts*, 104 S.Ct. at 2608-2609 (Blackmun J., joined by Brennan and Marshall JJ., dissenting). Such an interpretation would produce precisely the opposite result from that intended by Congress. The legislative history recounted above shows unmistakably that Congress decided that there were to be *no* quota remedies under Title VII. The unqualified assurances of the bill's sponsors would have been hollow, indeed, if they left room for quotas labelled "class-wide, race-conscious relief" (*Id.* at 2608). What quotas, after all, would not meet that description? It is self-evident that the fear to which these assurances were addressed was not that quotas would be awarded as relief to the victimized individuals (those individuals would be made whole by rightful place relief), but rather that quotas might eventuate from precisely the notion advanced by the dissenters in *Stotts*: that Title VII would be seen as an instrument for according preferences to races rather than relief to individuals. It was to refute that concern

prolong through the introduction of multiple amendments—it is entirely possible that those seeking to end the filibuster (and who voted against all the amendments proposed by Senator Ervin) were basing their vote not on the substance of each amendment, but on the tactical judgment that the way to end the filibuster was to vote down each amendment proffered by those conducting the filibuster. Moreover, those not wishing to forbid goals and timetables under the Executive Order were required to vote against the Ervin Amendment, and the vote therefore cannot be understood as manifesting a desire to overturn Congress' 1964 decision disapproving court-imposed quotas under Title VII: The importance of such tactical considerations in the legislative process makes it always dangerous to impute a new meaning to a previously enacted statute from the choice of a later Congress *not* to amend that legislation. "Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983).

that the bill's sponsors pointed to the last sentence of § 706(g) as proof that the remedies under Title VII were to be victim-specific.

This Court's decisions to date have been faithful to the victim-specific remedial scheme intended by Congress. And those decisions leave no room for the issuance of judicial quotas under the label "class wide, race-conscious relief" advocated in the *Stotts* dissent.

a) As this Court has consistently recognized, Title VII provides protection to individuals, not to races as such. The language both of the provision defining unlawful conduct (§ 703) and of the remedial provision (§ 706(g)) focuses expressly on protecting the "individual" from unlawful discrimination in employment. In *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) this Court stated:

The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class . . . Even a true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

In *Connecticut v. Teal*, 457 U.S. 440, 453-454 (1982), the point was repeated:

The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, e.g., §§ 703(a)(1), (b), (c)

And in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), this point was reiterated in each of the opinions. *Id.* at 1083-1086 (Opinion of Justice Marshall); *id.* at 1103 (Opinion of Justice Powell); *id.* at 1108 (Opinion of Justice O'Connor).

(b) Precisely because Title VII's focus is on the individual and not the racial class, this Court has recognized that in determining the appropriate remedy for a

Title VII violation—whether in an individual or a class action—relief must be limited to making whole individuals who have suffered discrimination by the defendant. Individuals whose claim to an entitlement to relief is that they are members of the same minority group as the victims, but who have not suffered from such discrimination, are already in the position they would have occupied in the absence of the defendant's discriminatory conduct and accordingly are not entitled to a court order that improves their position.

Thus, in *Franks v. Bowman Transportation Co.*, the Court drew the line as to the scope of permissible remedy between make-whole relief for "actual victims of racial discrimination" (424 U.S. at 772), which is permitted, indeed virtually required, and relief for nonvictims of such discrimination, which is not permitted. In *Franks*, the Court stated that the federal courts "are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." 424 U.S. at 764. And the Court made clear that members of the plaintiff class in *Franks* who were found *not* to be actual victims of the defendant employer's discrimination—*viz.*, who were "not in fact discriminatorily refused employment as an OTR driver" (*id.* at 773 n.32)—would not be entitled to any equitable relief. *Id.* at 772-773, and n.32. Then, in *Teamsters*, the Court analyzed at length the question of how to determine whether a claimant for relief is an actual victim of the litigated violation and thus eligible for relief. 431 U.S. at 356-377.¹¹ That lengthy discussion in *Teamsters*

¹¹ Under *Franks* and *Teamsters*, when a class violation of hiring discrimination is proven, the burden of proof shifts to the defendant to establish that individual members of the class who applied for the position or positions in question were not actually victims of the violation. This shift in the burden of proof, far from authorizing relief to nonvictims, simply determines how the court is to decide whether a given individual was a victim of discrimination and is thus entitled to relief. Members of the class against whom the unlawful practice was committed—*e.g.*, black applicants for jobs

would have been pointless if courts were empowered under Title VII to provide remedies to nonvictims.¹²

(c) This Court has also recognized that Title VII imports general principles of equity which may limit the remedial powers of courts even when the remedy is directed solely to victims of discrimination, and which certainly would preclude extending a preferential remedy to nonvictims at the expense of other innocent employees.

In the context of competitive hiring and promotion decisions, the Court has recognized that even a remedy designed only to make the victims of discrimination whole has a heavy cost: where a court order confers upon the individual who was a victim of the employer's wrong an improved competitive status with respect to a job, some employee who was not in any respect responsible for the employer's wrong is of necessity disadvantaged. A majority of the Court in *Franks* determined

from an employer who has been proved to have had an across-the-board practice of refusing to hire blacks—are presumed to be victims, unless the defendant proves otherwise. *Franks*, 424 U.S. at 772 n.32; *Teamsters*, 431 U.S. at 357-362.

¹² This Court's school desegregation decisions follow precisely the same remedial principle: "to restore the victims of discriminatory conduct to the positions they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("*Milliken II*"). In school cases, the violation generally consists of practices intentionally maintained by a school board for the purpose of segregating the races. All minority students subjected to such practices are victims of the violation. To make such victims whole may require both the "dismantling" of the discriminatory practices and the affirmative correction of education deficiencies which resulted from those practices. *Milliken II*, 433 U.S. at 282-283; *Swann v. Bd. of Educ.*, 402 U.S. 1, 28, 31-32 (1971). In that context, for example, make-whole relief may require that a "dual system" be dismantled, which may in turn require such actions as race-conscious assignment policies for teachers and pupils alike. But, in that context, too, this Court has been careful to confine remedial decrees to the make-whole purpose, and has not permitted such decrees to be used to achieve goals, such as racial balancing, beyond that purpose. *Swann*, 402 U.S. at 15-16, 31-32; *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 435-437 (1976); *Dayton Board of Education*, 433 U.S. 406, 419-420 (1977).

that it is consistent with equity for the innocent employee to be disadvantaged so that the victim can be made whole. 424 U.S. at 776-779; compare *id.* at 780-781 (Opinion of Chief Justice Burger) and *id.* at 787-793 (Opinion of Justice Powell.) But the majority recognized that there might be circumstances in which considerations of equity would dictate limiting the relief out of concern for the innocent employee. *Id.* at 779-780 & n. 41.

In *Teamsters*, after making it clear that nonvictims have no entitlement to a remedy of competitive seniority, 431 U.S. at 367-372, the Court stated that equitable balancing is required even in determining remedies for victims:

[A]fter the victims have been identified and their rightful place determined, the District Court will . . . be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing. [431 U.S. at 372 (emphasis added).]

In *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), the Court disapproved as inequitable a remedy that would have encouraged employers to give competitive seniority advantage to persons who claim they are victims of discrimination but whose claims have not yet been adjudicated:

. . . Title VII . . . permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 723 (1978). See also *Teamsters v. United States*, 432 U.S. 324, 371-376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination

The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their

claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that the "large objectives" of Title VII, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (citation omitted), require innocent employees to carry such a heavy burden. [458 U.S. at 239-240.]

Where, as in the instant cases, a court is asked to direct that a nonvictim of discrimination be given a job instead of an innocent employee of a different race, solely because the nonvictim is of the same race as other persons who were actually discriminated against, there is not the competition of legitimate interests that calls into play equitable discretion. To give the nonvictim the job is not to "restore [him to his] rightful place" (*Teamsters*, 431 U.S. at 375)—he was not wrongfully deprived of that place in the first instance. On the other hand, the "innocent worker" deprived of a job would have had a "wrong done him." *Ford Motor Co.*, 458 U.S. at 240.

II. RACIAL QUOTA REMEDIES ARE NOT AUTHORIZED FOR VIOLATIONS OF 42 U.S.C. § 1981

The question whether courts may impose racial quotas benefiting nonvictims at the expense of innocent persons upon finding a violation of 42 U.S.C. § 1981 was not addressed in *Stotts*, see 104 S.Ct. at 2590, n. 16, but arguably is presented here in No. 84-1999 (see p. 1, n. 1 *supra*). As in the case of Title VII, the question is strictly one of statutory interpretation.

Section 1981 provides in pertinent part:

All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1981 forbids racial discrimination in private as well as public employment, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1985), and protects whites equally with blacks against such discrimination, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976).

1. Analysis of the permissible scope of judicial remedies properly begins with the nature of the substantive right that Congress sought to vindicate. It is difficult to conceive of a statutory command to which quota "remedies" according preference to nonvictims on the basis of race would be more antithetical than the command of § 1981. If one or more persons are denied "the same right . . . to make and enforce contracts," it is plain that the court is empowered to make the victims whole for that deprivation and assure that the wrong is not repeated. But for a court to impose a quota that would run to the benefit of other persons who were *not* victims of a violation of § 1981, and that would extend them a preference based solely on their race over others who have done no wrong, would be to visit the very injustice against which § 1981 was directed. The innocent white would be deprived of "the same right" to make contracts as the nonvictim black; and the judicially-ordered racial preference would violate the statute's command that "all persons" are to "be subject to like punishment, pains, penalties . . . and exactions of every kind, and to no other" (emphasis added).

The remedial power of a court sitting in equity is not unlimited. *Swann v. Board of Education*, 402 U.S. 1, 31 (1971); *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976); *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 434 (1976). Cf. *Hecht v. Bowles*, 321 U.S. 321, 329-330 (1944). Foremost among the applicable limitations is that "the scope of the remedy is determined by the nature and extent of the . . . violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (*Milliken I*); see also, e.g., *Swann*, 402 U.S. at 16; *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (*Milliken II*): "Rights, constitutional or otherwise, do not exist in a vacuum. Their

purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect," *Carey v. Phipus*, 435 U.S. 247, 254 (1978). The remedies fashioned for deprivation of those rights "should be tailored to the interests protected by the particular rights in question" (*id.* at 259). The task of the equity court "once a . . . violation is found, . . . is . . . to tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation.'" *Hills*, 425 U.S. at 294; see also *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977). And this Court has defined with precision the way in which the remedy must relate to the violation: "the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Milliken II*, 433 U.S. at 280 (emphasis added); see also *Milliken I*, 418 U.S. at 76. See p. 18 n. 12, *supra*.

Thus, in assessing whether a remedial decree has exceeded proper limits, it is critical to know what is the violation being remedied, who are the victims, and how has the violation affected the victims. Section 1981 is designed to protect individuals from discrimination on the basis of race; it is not intended to mandate racial balance or the achievement of particular proportions of the races in a given workforce. In the words of one of its sponsors, § 1981 "is not for any race or color . . . but . . . will, if it become[s] a law, protect every citizen . . ." (quoted in *McDonald v. Santa Fe*, *supra*, 427 U.S. at 295). And, this Court has held that § 1981 does not reach "practices that merely result in a disproportionate impact on a particular class . . ." *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 386 (1982).

It follows from what we have shown thus far that under § 1981 the individuals who have suffered discrimination by the defendant—the victims—are the ones entitled to be made whole. Individuals whose claim to an

entitlement to relief is that they are members of the same racial group as the victims, but who have not suffered from such discrimination, are already in "the position they would have occupied in the absence of [the defendant's discriminatory] conduct," *Milliken II*, 433 U.S. at 280, and are not entitled to a court order that improves their position—an order that would yield them "a windfall, rather than compensation," *Carey v. Phipus*, 435 U.S. at 260.

That would be the case even if an award to nonvictims would not harm innocent third parties. But in employment discrimination cases such as these, where relief that benefits nonvictim blacks necessarily deprives innocent whites of employment opportunities, it is all the more clear that "the 'historic power of equity'" (*Albemarle Paper Co., v. Moody*, 422 U.S. 405, 416 (1975)) does not countenance such relief. That is the teaching of this Court's analysis of the competing equities at issue in *Franks*, *Teamsters*, and *Ford* (see pp. 17-20 *supra*); and that teaching is equally applicable under § 1981. Thus, to hold that quota remedies are available under § 1981 would require the conclusion that the post-Civil War Congress intended to authorize the courts to prescribe a form of relief which, under long-established principles of equity, is an inappropriate remedy for a violation of the rights Congress created in that statute. There is no basis for such a conclusion. Not only were such remedies unheard of at the time § 1981 was enacted (indeed, for a century thereafter), but they would be antithetical to the very values enshrined in § 1981.

2. Analysis of the courts' remedial authority in § 1981 actions is not complete without consideration of 42 U.S.C. § 1988. Section 1988 was enacted at the same time as § 1981 and applies to suits brought pursuant to § 1981. Section 1988 does not itself specify remedies for § 1981 actions. But § 1988 does state that in § 1981 suits courts will enforce their jurisdictions "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect"; only if "the laws of

the United States . . . are not adapted to the object [of § 1981], or are deficient in the provisions necessary to furnish suitable remedies," may the courts apply "the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of such . . . cause is held" 42 U.S.C. § 1988.

In *Smith v. Wade*, 461 U.S. 30 (1983), a closely-divided Court stated—presumably on the basis of § 1988—that the remedies available in a § 1983 action are not necessarily fixed at those that could have been within the contemplation of the Congress that enacted § 1983, explaining that "if the *prevailing view* on some point of . . . law has changed substantially in the intervening century . . . we might be highly reluctant to assume that Congress intended to perpetuate a *now-obsolete* doctrine," *id.* 34, n.2 (emphasis added); but see, *id.* at 65-66 (Rehnquist, J., dissenting); *id.* at 92-93 (O'Connor, J., dissenting). Assuming that the same approach would prevail in § 1981 actions, that approach would only strengthen the view that quota remedies are impermissible in such actions. For that approach would lead directly to the determination of the modern Congress, in enacting Title VII, to forbid racial quota remedies.

In the intervening century between enactment of § 1981 and enactment of Title VII there was no evolution making quota remedies the "prevailing view" or their refusal an "obsolete doctrine." Indeed, at the time Congress was debating Title VII in 1964, quota remedies were non-existent, a point cited by the sponsors of Title VII as proof that such remedies would not result under Title VII.¹³ Racial quotas have emerged subsequent to

¹³ See, e.g., 110 Cong. Rec. 6001 (Sen. Humphrey, explaining that quota remedies have not eventuated under State FEPC laws); *id.* at 7800 (colloquy between Senators Humphrey and Smathers in which they agree that no State has ordered quotas under its FEPC law); *id.* at 8921 (Sen. Williams of New Jersey explaining that quota remedies have not been issued in cases finding racial discrimination in the selection of juries). The opponents of Title VII had

1964 only in lower court orders that have misapplied the congressional will in Title VII cases.

Moreover, it is surely pertinent in applying § 1988 that when Congress first addressed the propriety of quota remedies—during consideration of Title VII—it set its face squarely against them. While the precise product of the 1964 debates was a determination that quota remedies would not be authorized under Title VII (see part I, *supra*), that result does not reflect simply a choice not to add a particular remedy to the arsenal of powers afforded the judiciary for enforcement of that particular statute (as is the case, for example, in the judgment to provide only equitable relief (including backpay), and not compensatory or punitive damages, under Title VII). Rather, the decision not to authorize quota remedies reflects a congressional determination that governmentally-imposed quota remedies are antithetical to the very values upon which Title VII is premised. In the words of the Clark-Case materials, quota remedies were not being authorized in Title VII because "[q]uotas are themselves discriminatory" (110 Cong. Rec. 7218).¹⁴ See also, Senator Humphrey's repeated declarations that he would "vote against" Title VII if it authorized quota remedies, (*id.* at 5092), that such remedies were a "bugaboo" and the "very opposite" of what Title VII was attempting to achieve (*id.* at 6548; see also, *id.* at 11847), and that "I do not believe in a quota system" (*id.* at 7800). And see, to the same effect, 110 Cong. Rec. 8500, 9881 (Sen. Allott); *id.* at 9113 (Sen. Keating).

raised the spectre of quota remedies not because there was a backdrop of judicial quota remedies in other contexts—there was not—but because they feared that the then-incumbent administration would champion them, as "evidenced by numerous Executive orders, other administrative actions and statements of officials in the executive branch of the Federal Government." H.R. Rep. No. 914, 88th Cong. 1st Sess. 64, 68 (1963) (Minority Report).

¹⁴ This theme appeared throughout the Clark-Case materials. See, e.g., 110 Cong. Rec. 7207 (Dept. of Justice letter); *id.* at 7213 (Clark-Case interpretative memorandum). See *supra*, p. 6 n. 4.

Given that §§ 1981 and 1988 had not been construed to authorize quota remedies prior to 1964, and that Congress in that year, upon first addressing the propriety of racial quotas, adjudged them antithetical to the principle of equal employment opportunity, it would be inappropriate to import them through subsequent judicial interpretation of §§ 1981 and 1988. Courts should not be free effectively to circumvent the judgment of the Congress that enacted Title VII by imputing to the Congress that enacted §§ 1981 and 1988, without a basis in the legislative materials, an "intent" to allow quota remedies.

3. Even without the express command of § 1988 that resort be had to other federal laws, the principle that general legislation should not be interpreted by the courts to achieve results inconsistent with the clear intent of Congress manifested in later, more specific legislation would point to the same result. In *Labor Board v. Drivers Local Union*, 362 U.S. 274 (1960), for example, the NLRB had construed Section 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A)—which in general terms makes it an unfair labor practice for a union "to restrain or coerce" employees in the exercise of their Section 7 rights—to outlaw all recognitional picketing. This Court reversed, relying in part upon the fact that when Congress later focused specifically on recognitional picketing it outlawed only certain forms of such picketing:

To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit. We avoid the incongruous result implicit in the Board's construction by reading § 8(b)(1)(A), which is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor policy. [362 U.S. at 291-92].

See also, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193-95 (1967); *Hunter v. Erickson*, 393 U.S. 385, 388 (1969). The language of §§ 1981 and 1988 is not so "vague" as even to be "read literally" to authorize quota remedies. But even if it were, the principle just quoted would dictate against such remedies, particularly where, as here, what is at issue is the proper exercise of the courts' equity powers. For it can hardly be equitable for a court to award under § 1981 the very relief that Congress denounced as unjust when it enacted Title VII.¹⁵

¹⁵ We recognize that this Court has "generally conclude[d] . . . that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975). But while it follows that remedies are not foreclosed for § 1981 violations simply because they are not authorized for Title VII violations (e.g. compensatory and punitive damages, *id.* at 460), it does not follow that under § 1981 courts may award remedies that Congress concluded in enacting Title VII were a positive evil. A too-rigid adherence to the independence of § 1981 from Title VII could lead, for example, to the invalidation of seniority systems that Congress acted affirmatively to "protect" in Title VII (see, e.g., *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, 474-75 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n.37 (5th Cir. 1977), *cert. denied*, 439 U.S. 1115 (1979)), or, as here, to the erosion of other values that a contemporary Congress has adopted as the policy of our nation.

A useful analogy is furnished by this Court's treatment of 42 U.S.C. § 1982, which was enacted as part of the same statute as § 1981. In *Jones v. Mayer Co.*, 392 U.S. 409, 416 (1968), this Court declared that "[t]he Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute." One year later, the Court ruled, in *Hunter v. Erickson*, 393 U.S. at 388:

The 1968 Civil Rights Act specifically preserves and defers to local fair housing laws, and the 1866 Civil Rights Act considered in *Jones* should be read together with the later statute on the same subject, *U.S. v. Stewart*, 311 U.S. 60, 64-65 (1940); *Tablot v. Seeman*, 1 Cranch. 1, 34-35 (1801), so as not to pre-empt the local legislation which the far more detailed Act of 1968 so explicitly preserves.

III. RACIAL QUOTA REMEDIES ARE NOT AUTHORIZED IN ACTIONS BROUGHT UNDER 42 U.S.C. § 1983

In the case of public employers, racial discrimination also violates the Fourteenth Amendment and is actionable under 42 U.S.C. § 1983. This Court did not address in *Stotts* whether quota remedies are available in § 1983 actions, see 104 S.Ct. at 2590, n.16.

Just as in the case of § 1981, suits brought under § 1983 are subject to the provisions of § 1988. And, like Title VII and § 1981, the rights enforced in a § 1983 action are the rights of *individuals* to be free of racial discrimination. Section 1983 by its terms protects "any citizen . . . or other person within the jurisdiction"; transgressors incur liability "to the party injured." See, e.g., *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 1948 (1985). And the Fourteenth Amendment itself—the source of the right to be free of racial discrimination enforceable under § 1983—is, like Title VII, designed to protect individuals. As this Court stated in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948):

[T]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

See also *Castaneda v. Partida*, 430 U.S. 482, 499-500 (1977); *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (Opinion of Justice Powell.)

And, this Court repeatedly has held that the Fourteenth Amendment, whether sued on directly or through § 1983, does not prohibit official conduct simply because that conduct has a greater adverse effect on racial or ethnic minority groups than on majority groups. In *Washington v. Davis*, 426 U.S. 229, 239 (1976), the

Court held that "a racially neutral qualification for employment is [not] discriminatory . . . simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Id.* at 245. "That other Negroes also failed to score well would, alone, not demonstrate that [plaintiffs] *individually* were being denied equal protection of the laws . . ." *Id.* at 246 (emphasis added). See also, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-265 (1977); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

With these similarities established, the analysis we have heretofore provided with respect to § 1981 is equally applicable to suits brought under § 1983. The "historic power of equity" no more warrants judicial dispensation of racial preferences to nonvictims over other innocent persons in § 1983 actions than in § 1981 actions.¹⁶

¹⁶ Of course, given that § 1983 furnishes a cause of action to enforce constitutional rights it is arguable that the courts in § 1983 actions have the power to issue remedies beyond those authorized by Congress. That power of course would remain circumscribed by the basic principle of equity that "the scope of the remedy is determined by the nature and extent of the violation." See cases cited *supra* at pp. 21-22. And even if the courts were somehow released from that limitation, it would not follow that Congress' judgments about what remedies are appropriate, and what inappropriate, are to be disregarded in fashioning relief for constitutional violations. Thus, even assuming *arguendo* that the federal courts have power in constitutional cases to enter quota remedies compelling the subordination of the interests of innocent employees of one race to advantage nonvictims of another race, the congressional judgment that such remedies are inappropriate is entitled to weight in the courts' determination whether that power should be exercised. In *Bush v. Lucas*, 462 U.S. 367 (1983), for example, where the petitioner sought "a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors" (*id.* at 368), this Court declined to adopt this remedy, explaining:

Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive remedies . . . we conclude that it would be inappropriate for us

CONCLUSION

For the reasons set forth above, the decisions of the courts of appeals in these cases should be reversed.

Respectfully submitted,

Of Counsel:

EDWARD D. FOY, JR.
 LIEDERBACH, ROSSI, HAHN,
 & FOY
 892 Second Street Pike
 Richboro, PA 19854
*Attorney for Amicus Local 542,
 International Union of
 Operating Engineers*

GEORGE H. COHEN
 BREDHOFF & KAISER
 1000 Connecticut Ave., N.W.
 Suite 1300
 Washington, D.C. 20036
*Attorney for Amicus Local 36,
 International Association
 of Firefighters*

ROBERT M. WEINBERG *
 MICHAEL H. GOTTESMAN
 JEREMIAH A. COLLINS
 BREDHOFF & KAISER
 1000 Connecticut Ave., N.W.
 Suite 1300
 Washington, D.C. 20036
 (202) 833-9340
*Attorneys for Amici Local 542,
 International Union of
 Operating Engineers and
 Local 36, International
 Association of Firefighters*

* Counsel of Record

to supplement that regular scheme with a new judicial remedy.
[Ibid.]

This Court did not question its "power [in suits arising directly under the Constitution] to grant relief that is not expressly authorized by statute" (*id.* at 373), but concluded that the circumstances warranted no departure from its predisposition that "such power is to be exercised in the light of relevant policy determinations made by the Congress" (*ibid.*). The Court ultimately answered in the negative the question "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by a new judicial remedy for the constitutional violation at issue." *Id.* at 388.

APPENDIX

APPENDIX

Additional Statements of Proponents of the Bill That Became the Civil Rights Act of 1964 Respecting the Availability of Quota Remedies under Title VII

The Republican sponsors of Title VII in the House, in their "Additional Views" to the House Judiciary Report, declared:

It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.¹

Senator Clark, one of the bipartisan "captains" for Title VII, declared in his principal speech describing Title VII: "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate."² At the conclusion of his speech he introduced a Justice Department letter that stated:

There is no provision, either in title VII or in any other part of the bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . .³

Senator Humphrey, responding to a political advertisement opposing enactment of Title VII, stated on the floor of the Senate:

¹ H. Rep. No. 914, *supra*, at 150.

² 110 Cong. Rec. 7207.

³ *Id.* at 7207.

[N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group.⁴

And, responding to a charge by Senator Smathers that Title VII would lead to employment quotas, Senator Humphrey declared:

The quota system which has been discussed is nonsense. Everybody knows that it is not in the bill, and that where there are State FEPC laws, it is not the pattern.

. . . The only thing that the court would do would be to ask the defendant to cease and desist, to tell him to stop this practice, if it can be proved that the practice has been unlawful.⁵

Senator Humphrey, in an extended colloquy with Senator Robertson, made the following remarks:

I feel sure that the Senator from Virginia is not going to suggest or intimate that under this title of the bill there would be such a thing as a quota or a required percentage.

[C]an the Senator from Virginia point out in title VII any section or subsection or provision that would indicate that in connection with the elimination of the segregation in employment based on color, race, religion or national origin an employer would be required to hire any member of a certain ethnic group?

I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating

⁴ *Id.* at 5423.

⁵ *Id.* at 6001.

the pages one after another, because it is not in there.⁶

Senator Allott, one of the Republican sponsors of the bill, in another colloquy with Senator Smathers, expressed his disapproval of governmentally-imposed quotas:

I completely agree with the Senator that if an employer were required to employ a person on the basis of a quota, there would be no justification for that procedure under the American system . . .

The only point I wish to make is that if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill.⁷

Senator Williams of New Jersey, declaring that "there is nothing whatever in the bill that provides for racial balance or quotas in employment," cited as proof of this proposition that courts did not enter quotas remedies upon finding racial discrimination in the selection of juries.⁸

Senator Keating, in a colloquy with Senator Sparkman, secured the latter's agreement that "the bill does not provide in any way for quotas of any kind."⁹ Senator Keating later declared, in response to a public advertisement that the bill would require quotas:

The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .

Title VII does not grant this authority to the Federal Government . . .

⁶ *Id.* at 7418-20.

⁷ *Id.* at 8500-01.

⁸ *Id.* at 8921.

⁹ *Id.* at 8618.

An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution.¹⁰

¹⁰ *Id.* at 9113.

AMICUS CURIAE

BRIEF

9
No. 84-1656

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKER'S INTER-
NATIONAL ASSOCIATION, AND LOCAL 28 JOINT
APPRENTICESHIP COMMITTEE,
Petitioners

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

~~MOTIONS PURSUANT TO RULES 33.7 AND 42 AND~~
BRIEF AMICUS CURIAE OF NORTH CAROLINA
ASSOCIATION OF BLACK LAWYERS

JOSEPH A. BRODERICK
(Counsel of Record)
1917 S. Lake Shore Drive
Chapel Hill, N.C. 27514
(919-929-7049)
Attorney for Amicus Curiae,
North Carolina Association
of Black Lawyers

[Additional Counsel on Inside Cover]

Of Counsel

WAYNE ALEXANDER
W. STEVEN ALLEN
FRANK W. BALLANCE, JR.
RANDOLPH BASKERVILLE
VICTOR BOONE
ROBERT BURFORD
G. K. BUTTERFIELD
GREGORY DAVIS
CHARLES E. DAYE
JOHN DUSENBURY
EUGENE ELLISON
JAMES E. FERGUSON II
BRENDA M. FOREMAN
JOHN H. HARMON
IRVING JOYNER
MICHAEL E. LEE
WILLIAM A. MARSH, JR.
BRENDA F. MCGHEE
FLOYD B. MCKISSICK, SR.
BEVERLY R. MITCHELL
T. DIANE PHILLIPS
RONNIE C. REAVES
GERALD E. RUSH
PAMELA STANBACK
ACIE L. WARD
JUDITH WASHINGTON
MELVIN WATT
EDWINA L. WILSON
KAYE R. WEBB

IN THE
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OCTOBER TERM, 1985

No. 84-1656

LOCAL 28 OF THE SHEET METAL WORKER'S INTER-
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

**On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit**

MOTIONS PURSUANT TO RULES 38.7 AND 42

1. Motion Pursuant to Rule 38.7

The "Brief for the Equal Employment Opportunity Commission", filed herein ostensibly renounces the role of respondent (EEOC Br. p. 10). It is a thinly disguised vehicle for total demolition of affirmative action goals, a carefully balanced remedy crafted by the federal courts under the guidance of decisions of this Court.

Consider the fact that the United States sought and obtained in the Court of Appeals the very relief in this case that it now calls violative of Title VII and the Constitution. Consider the fact that another litigant changing position from the Court of Appeals to the Supreme Court would be chastised by the mildest version of judi-

cial estoppel.* Consider that the Solicitor General has burdened this Court and the litigants and amici in this case with the responsibility of dealing with briefs in three other cases that he has filed. While no one would discourage the Solicitor General's right to confess error, the error he should confess herein is the multiplication of briefs and the 180° change of position of the EEOC between the Court of Appeals and the Supreme Court with respect to the issue of central importance in this case.

The Solicitor General now asks for more time to explain the new EEOC position. Amicus understands his difficulties. But his change of position in this case puts the burden of defending the historic position of the EEOC and the United States with respect to affirmative action goals upon two ancillary respondents, with special responsibilities of their own, and upon amici.

Mindful of the understandable and almost exception-proof position of this Court against permitting oral argument by an amicus curiae, movant North Carolina Association of Black Lawyers, moves this Court to allow 15 minutes of oral argument by its counsel of record in this case.

The multiplication of briefs presents no small burden. Instead of the 50 pages allocated to a respondent's brief by Rule 54.3, the Government briefs served on the remaining respondents herein total 125 (not including 69 pages of Appendix in *Orr v. Turner*, No. 85-177). In

* See, for example, *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982): "Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. . . . Judicial estoppel is intended to protect the integrity of the judicial process. . . . Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. . . . The doctrine of judicial estoppel applies to a party who has successfully asserted a position in a prior proceeding; he is estopped from asserting an inconsistent position in a subsequent proceeding." (690 F.2d at 598-599).

the course of this avalanche, in reversing its position from the Court of Appeals the Government cites 125 separate cases (148 counting duplications).

More important still, on an issue of crucial national importance the judgment below which the EEOC abandons in this Court is left an orphan. Amicus greatly respects the litigating prowess of the Attorney General of the State of New York, and of the Corporation Counsel of the City of New York, the remaining respondents. But they have governmental responsibilities of their own which they must take into account. The judgment below needs an independent and unfettered advocate, especially with respect to the vital question raised as to Section 706(g) of Title VII.

2. Motions Pursuant to Rule 42

(1) Should the Court not grant amicus' motion pursuant to Rule 38.7, amicus respectfully moves this Court to appoint a special counsel or amicus curiae to defend the judgment granted to the EEOC in the Court of Appeals, with particular reference to the availability of race-conscious affirmative action goals under Section 706(g). The same grounds led this Court to appoint a special counsel in *Bob Jones v. United States*, 456 U.S. 922 (1982), 461 U.S. 576 (1983) "to brief and argue . . . as *amicus curiae* in support of the judgments below" (456 U.S. at 922), when the Department of Justice in a comparable switch declined to defend its judgment won in the Court of Appeals. See also *United States v. Lovett*, 328 U.S. 303 (1946). The arguments in support of amicus' above motion pursuant to Rule 38.7 are enlisted in support of this alternative motion. The *Bob Jones* precedent should be operative in these "most extraordinary circumstances." (Cf. Rule 38.7).

(2) Amicus, North Carolina Association of Black Lawyers, further respectfully moves this Court pursuant to Rule 42.

After this brief had been substantially completed, movant's counsel of record had the opportunity to read the brief which the EEOC prepared to be filed in *Williams v. City of New Orleans*, 729 F.2d 1573 (5th Cir. 1984, en banc). As to that brief and the circumstances surrounding the Department of Justice's decision not to present it to the Court of Appeals, see the opinion of Judge Wisdom, joined by five other judges, concurring in part and dissenting in part (729 F.2d at 1570-1584, with particular reference to 729 F.2d at 1572n5). That unsubmitted EEOC brief's review of the legislative history of Section 706(g), and of the decisions of this Court relating thereto, is a model of dispassionate legal research, in striking contrast to the revisionist interpretations presented for the EEOC herein. Accordingly, North Carolina Association of Black Lawyers respectfully further moves this Court to direct counsel for the EEOC herein to file in this court, and serve on parties and amici, copies of the EEOC brief that was prepared for the en banc hearing in *Williams v. City of New Orleans*. The objective of this motion is to afford this Court the litigating assistance of counsel to which it is entitled with respect to an issue of crucial national significance, and to partially correct the litigating imbalance created by the EEOC's renouncement of its role of respondent in this Court, and its multiplication of briefs herein.

In view of the above, movant, North Carolina Association of Black Lawyers, respectfully moves this Court that:

1. Amicus' North Carolina Association of Black Lawyers' counsel of record be granted 15 minutes of oral argument;
2. Alternatively, that this Court appoint counsel to defend the judgment below, with particular reference to the question whether race-conscious affirm-

ative goals are "appropriate" relief for identified race discrimination, under Section 706(g) of Title VII of the Civil Rights Act of 1964, as amended, and under the equal protection component of the 5th Amendment of the U.S. Constitution; and that

3. Counsel for the EEOC herein be directed to file in this Court, and serve on parties and amici herein, copies of the EEOC's unsubmitted en banc brief in *Williams v. City of New Orleans*, 729 F.2d 1573 (5th Cir. 1984).

Respectfully submitted,

JOSEPH A. BRODERICK
Attorney for Amicus Curiae,
North Carolina Association
of Black Lawyers

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On Writ of Certiorari to the United States
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BRIEF AMICUS CURIAE OF NORTH CAROLINA
ASSOCIATION OF BLACK LAWYERS

INTEREST OF AMICUS CURIAE

The attorneys for petitioners, the attorneys for respondents, and the attorney for the Equal Employment Opportunity Commission, an erstwhile respondent, have consented to the filing of this brief of the North Carolina Association of Black Lawyers in support of the position of the respondents under Rule 36.

Amicus, North Carolina Association for Black Lawyers, is an unincorporated professional association composed primarily of black and other minority lawyers and law teachers, located chiefly in the State of North Carolina.

The member attorneys of the North Carolina Association of Black Lawyers have been in the forefront of the legal and social struggle of the past four decades for civil rights in North Carolina, particularly working against racial discrimination and the polarization of the work force along racial lines. They had been encouraged

by the slow but unmistakable easing of racial tensions, and by what seemed to be the long sought beginnings of an era in which men and women would replace decades of racial bigotry and distrust with mutual respect. Yet 20 years after the enactment of the Civil Rights Act of 1964 they see in North Carolina, as elsewhere, the continued racial polarization of the work force, the continued prominence of black workers in lower-paying job categories and in unemployment statistics.

Our particular interest in filing an amicus brief in this case is to persuade the Supreme Court to affirm the judgment below, particularly insofar as it enforces judicially ordered race-conscious goals and time tables as a temporary remedy for identified, past, egregious racial discrimination that cannot be remedied by lesser means.

The North Carolina Association of Black Lawyers and its members have had, over the years, a close association with North Carolina Central University School of Law, a state law school located in Durham, North Carolina. The plurality of members of the Association are graduates of that Law School, as are the preponderance of the black lawyers practicing in North Carolina. In its inception an all-black institution, North Carolina Central University Law School has been for years the most integrated professional school in the United States, with approximately 55% black and 45% white students working side by side. This institution's interracial collaboration in student body, faculty and alumni, presents a model for all who aspire to a racially healthy and collaborative North Carolina and United States.

Unfortunately, comparable depolarization is not evident in our state work force, and there is no realistic reason to expect that there can be, without the possibility of judicially enforced affirmative relief being directed to job quarters that are both laggard and recalcitrant. We do not suggest that Title VII of the Civil Rights Act of 1964 dictates "racial balance" in employment. Of course, it does not. But Congress did specifically legis-

late in 1964 as a remedy for proven discrimination "such affirmative action as may be appropriate" (Sec. 707(g)), without any limitation to "specific victims". This Court has found race-conscious affirmative relief "appropriate", when measured by the extent of the constitutional violation, as a remedy for racial discrimination in school desegregation and voting rights setting. With respect to employment and unemployment, the same question arises: What kind of country are we aiming to be? Surely not a nation enmeshed in permanent racial polarization.

We add our lawyers' voices here to the cause of racial depolarization and Dr. King's dream by urging that in sensitive judicial hands, Title VII is equal to its primary task, which has already been identified by the Court: "to open employment opportunities for Negroes in occupations which have been traditionally closed to them" (*United Steelworkers v. Weber*, 443 U.S. 193 (1979)).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus, North Carolina Association of Black Lawyers, focuses its argument for affirmance of the judgment below upon a single critical issue: the legality, under Section 706(g) of Title VII, and the constitutionality, under the equal protection component of the 5th Amendment, of the race-conscious membership goal decreed by the district court and affirmed by the Court of Appeals.

Amicus argues that the sole statutory question before this Court as to the affirmative goal remedy is whether such relief is "appropriate" under Section 706(g) of Title VII. In Section 706(g) Congress delegated to the federal courts the power and responsibility of determining "appropriate" equitable relief for violations of Title VII, as set forth in Sections 703-704. (I). An unbroken procession of previous decisions of this Court confirm that there is no statutory bar in Title VII to judicially prescribed affirmative goal relief. (II)

Amicus further argues that affirmative action goals, such as the membership goal prescribed by the courts below, constitute "appropriate" relief under Section 706 (g). (III). Objections of petitioners and the EEOC to the remedy decreed by the courts below ignore the statutory language of Title VII, misread the legislative history, and contravene this Court's consistent interpretation in its decisions of the parameters of Section 706(g). Particularly misleading is the petitioners' and EEOC's attempt to confine 706(g) remedies to "make whole" relief. (IV). Finally, amicus argues that this Court's constitutional decisions bearing on race-conscious affirmative remedies reinforce the judgment below. (V).

For these reasons, amicus respectfully asks this Court to affirm the judgment of the Court of Appeals, with respect to the race-conscious membership goal decreed by the district court as partial remedy for egregious past racial discrimination by defendant union.

The main thrust of amicus' argument is that, contrary to petitioners' and the Government's contentions, Title VII contains no bar to a race-conscious affirmative goal remedy. On the contrary, Section 706(g)'s express provision for "affirmative" relief fully supports affirmance of the judgment below with respect to the membership goal, in light of past decisions of this Court.

Petitioners argue that the comments of legislators which it cites support a construction of Title VII which bars race-conscious affirmative remedial goals for "egregious" past racial discrimination. This misses the mark, because the cited legislator comments concern the violation sections of the statute (Sec. 703-704), and not the remedial section (Sec. 706(g)). Beyond this, petitioner simply states that *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984) (*Stotts*) foreclosed all race-conscious remedial relief to individuals who were not shown to be specific victims of the identified discrimination. Amicus argues that this conclusion is demonstrably wrong.

The Government, in its four briefs * served upon parties and amici herein, initially agrees with amicus' position that resolution of the goal issue depends solely on this Court's construction of Section 706(g), and not upon construction of the violation sections (Sec. 703-704). But, in practice, when convenient, the Government departs from its previously avowed position. The Government, like petitioner, argues that this Court has already decided, in *Stotts*, that race-conscious affirmative remedial goals violate Section 706(g) because they benefit individuals who are not shown to be specific victims of the identified "egregious" racial discrimination. On the way to that conclusion the Government's briefs sow many errors and confusions that amicus believes should be identified, and corrected, at the outset, to provide the setting for amicus' argument in this brief. These errors and confusions may be summarized here under three headings:

1. The Government confuses "part" with "whole" in discussing the impact of *Stotts* upon Section 706(g)

In her opinion for the Court in *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982), Justice O'Connor carefully noted that two chief statutory purposes guide the Court in interpreting Section 706(g)—(1) the group or class "remove barrier" relief (within which injunctions and affirmative goals fit), and (2) "make whole" individual relief. In contrast, the Government argues that *Stotts*, in dealing expressly with a "make whole" contention, served to wipe out the possibility of any affirmative group relief to "remove barriers" grounded in race from individuals seeking employment or membership in a union or employment program, unless the individuals had been previously proven to be "victims" of the identified violation of Title VII. Clearly, *Stotts* dealt solely

* Amicus cites herein the principal Government brief in this case as "G. Br. #1", the Government brief from *Vanguards* as "G. Br. #2", the Government brief from *Wygant* as "G. Br. #3" and the Government brief from *Orr v. Turner* as "G. Br. #4".

with "Title VII's secondary, fallback purpose . . . to compensate the victims for their injuries. . . ." (*Ford*, 458 U.S. at 230), and specifically with the special restriction on "make whole" relief where seniority rights protected by Section 703(h) are concerned. *Stotts*, in fact, had no concern with the question whether race-conscious affirmative goals might be "appropriate" in light of "Title VII's primary goal . . ., the goal of ending discrimination." (*Ford*, 458 U.S. at 230). That precise question, in the context of a judicial remedy under Section 706(g), is freshly before the Court in this case.

2. The Government assumes *a priori*, without any authority and against this Court's decisions, that Section 706(g)'s express language excludes all race-conscious affirmative goal relief

This Government assumption is indeed odd in view of the breadth of Congress' language in Section 706(g): "the court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include, but is not limited to . . . hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." The Government's tortured arguments around this language are all gravely flawed, and leave its conclusion as simply an *a priori* assumption.

In a curious switch from its earlier correct contention that Section 706(g) must be interpreted independently of Sections 703-704 (the violation sections), the Government argues that Section 703 negates the availability of race-conscious affirmative goals.

After *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) had expressly left the question open, *Weber*, 443 U.S. 193 (1979), held that Section 703(a)-(d) did not bar all race-conscious relief. And Section 703(j) (even if germane with respect to Section 706(g)) by its terms refers only to "preferential treatment . . . on account of an imbalance", and not to a remedy for "egregious" racial discrimination. Note that the

Government identifies "the very egregiousness of petitioners' violations" as follows: "The original finding of liability in 1975 was 'based on direct and overwhelming evidence of purposeful racial discrimination over a period of many years' And both before and after this finding petitioners continued to build a record of resistance to other state and federal court orders designed to ensure non-discriminatory membership procedures." (G.Br. #1, p.34).

The Government argues (G.Br. #2, p.8) that the "plain meaning" of the last sentence of Section 706(g) bars a race-conscious affirmative goal remedy.

This sentence was clearly directed to foreclose individual "make whole" relief in the absence of a proof of a violation (of Section 703-704) against him—"discrimination on account of race, color, religion, sex, or national origin. . . ." Once again, it has no reference to "primary purpose" affirmative relief that is otherwise "appropriate". In its brief in *Local 28*, the Government, oddly, seems to back off from reliance on this last sentence of Section 706(g) as an independent argument. In fact the Government brief in *Local 28* says much on this with which amicus can agree:

The final sentence of Section 706(g) precludes a court only from awarding relief such as employment, union membership, or other preferences to non-victims on the basis of race, sex, national origin, or religion. It does not otherwise limit a court's 'broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of [Title VII] eliminate their discriminatory practices and the effects therefrom' (*Teamsters v. United States*, 431 U.S. 324, 361 n.47 (1977)). Affirmative action that corrects and prevents discriminatory practices without itself requiring discrimination is entirely consistent with the language and policy of Section 706(g). (G. Br. #1, p. 30).

Of course, here again, the Government indulges in the same bootstrap assumption referred to above, that race-

conscious affirmative goal relief is "discrimination" (as defined in Section 703). *Weber* squarely held to the contrary. We should, however, applaud the Government's ensuing resonance of amicus' basic contention: "We believe that those who violate Title VII should be made to take, specific, affirmative steps to correct their discriminatory practices and ensure equal opportunity in the future." (G.Br. #1, p. 31) If shorn of the Government's philosophical *a priori** (unsupported in the statute or the cases) amicus could concur in this ringing testimony to the breadth of the "affirmative action" clause of Section 706(g).

3. The Government makes an irrational leap in projecting the limited "victim" requirements in *Franks*, *Teamsters* and *Stotts*—all "make whole" cases with a "seniority" ingredient—to race-conscious affirmative goals judicially decreed in "egregious" cases in order to further "Title VII's primary goal—the goal of ending discrimination" (*Ford*, 458 U.S. at 230)

Given that there is no statutory or decisional bar to affirmative goal relief, as such, the question is open in this Court whether judicially decreed race-conscious affirmative goal relief is "such affirmative action as may be appropriate . . ." under Section 706(g). The Government makes an irrational leap from the limited requirements as to "victims" in the "make whole", "seniority" context of *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) (*Franks*), *Teamsters* and *Stotts* to race-conscious affirmative goals decreed to further "Title VII's primary goal . . . the goal of ending discrimination." (*Ford*, 458 U.S. at 230).

(1) The Government overstates the magnitude of the "victim" requirement in *Franks* and *Teamsters*. When an individual applicant seeks to recover the "make whole"

* For a contrary philosophical and "policy" view, see Broderick, *Affirmative Action After Stotts: The U.S. Supreme Court's 1985 Term*, 15 N.C.C.U. L. JOUR. 145 (1985) at pp. 188-189.

relief of competitive seniority in Phase 2, after class or group findings of discrimination in Phase 1, the burden is on the employer to prove that the individual is *not* a victim. Indeed, *Teamsters* extended this burden of proof on employers to non-applicants who have been deterred from applying. (2) The Court explained its requirements for non-applicants showing deterrence on the grounds that, if successful, they would receive competitive seniority at the expense of other "bona fide" seniority employees. In this context, one understands *Stotts*. (3) The reasons for requiring a limited "victim" approach in the "make whole" seniority cases has no applicability to affirmative goal relief. Those hired, or admitted to membership, under an affirmative goal remedy have *no* seniority over those otherwise senior because of a bona fide seniority system. They have *no* quasi-entitlement to selection or admission (as would "make whole" beneficiaries). The employer in the affirmative goal situation has full control over individual selection as to qualifications, etc.; his only responsibility is to make a reasonable overall effort to achieve the recommended goal. Assuming that a particular race-conscious affirmative goal meets this Court's requirements as to permissible affirmative action programs, there is no benefit in imposing even limited "victim" analysis; and the cost and delays of importing a Phase 2 proceeding here could not, therefore, be justified.

Amicus therefore rejects as insubstantial these Government arguments that race-conscious affirmative action goals per se, are not available or not "appropriate" to "nonvictims" under Section 706(g). Amicus recognizes that race-conscious affirmative goals must comply with the limiting factors identified by this Court (Cf. *Weber*). Since the membership goal here decreed by the district court was properly approved as not clearly erroneous by the Court of Appeals, amicus argues that the judgment below should be affirmed in that regard.

ARGUMENT

I. IN SECTION 706(g), CONGRESS DELEGATED TO THE FEDERAL COURTS PLENARY AUTHORITY AND RESPONSIBILITY OF DETERMINING "APPROPRIATE" EQUITABLE RELIEF FOR TITLE VII VIOLATIONS (SECTIONS 703-704)

The sole issue in this case with respect to the affirmative goal remedy is whether such relief is consistent with the language of Section 706(g), the remedial section of Title VII. This is conceded in the EEOC's principal brief in this case. (G. Br. #1, 11).

The statutory language is compelling: The original 1964 statute read:

If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . , the court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ." (Sec. 706(g)).

Thus Section 706(g), as enacted in 1964, by its terms delegated to the federal courts the task of devising equitable remedies for an "unlawful employment practice", that is, a violation of Section 703 or 704. The brief legislative history of the section reinforces the clear statutory language. The sole predicate for relief is clearly stated: a finding that "the respondent has intentionally engaged in the alleged practice. This alone is a condition for the granting of relief." (110 Cong. Rec. 11724 (1964)). The remedy of damages was withheld, but devising the scope of equitable relief was fully delegated to the courts in Section 706(g).

This conclusion is reinforced by a late change in that section shortly before the crucial votes in the Senate. What had previously been a mandatory requirement of affirmative relief upon a judicial finding of violation was modified to the language that was ultimately enacted as Section 706(g). Senator Dirksen explained the change as follows:

The mandatory requirement for affirmative action, including reinstatement and back pay, upon a finding of a violation has been revised to read: "may . . . order such affirmative action as may be appropriate, which may include reinstatement and backpay." (110 Cong. Rec. 12819 (1964)).

Senator Dirksen also called attention to a "new section (Sec. 707) establishing a cause of action based on a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title [VII], provided that the pattern or practice is of such a nature and is intended to deny the full exercise of those rights." (110 Cong. Rec. 12819 (1964)). This, of course, is the type action brought in *Local 28*, the authorization having been extended from the Attorney General to the EEOC by the 1972 amendments.

Section 706(g) thus by its terms clearly delegates to the court the task of designing not just individual "make whole" relief, but such "affirmative action as may be appropriate". Petitioner and the EEOC would, without justification, have the Court read into this statutory language and history an express and total bar to affirmative goal relief even after Congress' sole condition has been satisfied, the finding that "the respondent [petitioner here] has intentionally engaged in the alleged practice. . . ." (110 Cong. Rec. 12819 (1964)).

This almost plenary delegation of the remedy-defining prerogative to the courts derives from the 1964 Act itself. The 1972 Amendments did add two phrases to the language of Section 706(g): Instead of "such affirmative action as may be appropriate which may include reinstatement or hiring of employees, with or without back pay", the 1972 Amendments gave us the present statutory language: "such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate." (The 1972 Amendments also added a two year *limitation* on back pay.) While the position is tenable that this new

language did not increase the remedial power of the courts, the 1972 amendments certainly confirm amicus' argument that the original 1964 language of Section 706(g) constituted a plenary delegation of equitable remedial authority to the courts. When Congress wanted to limit its delegation it was well aware (both in 1964 and 1972) how to do so, e.g. the 1964 exclusion of a damages remedy and the express 1972 limitation with respect to back pay.

As amicus argues in the next section, this Court in its decisions has been constant in giving effect to the Congressional design of broad equitable relief, and has rooted its application of these remedial powers in two distinct statutory purposes of Title VII.

II. PREVIOUS DECISIONS OF THIS COURT CONFIRM THAT THERE IS NO STATUTORY BAR IN TITLE VII TO JUDICIALLY PRESCRIBED AFFIRMATIVE GOAL RELIEF

Decisions of this Court bearing upon the validity under Section 706(g) of Title VII of race-conscious, affirmative goal relief for proven racial discrimination may conveniently be discussed under four headings: (1) First, and foremost, the *general* remedial decisions in which this Court interpreted Section 706(g) in light of what the Court called the two major purposes of Title VII. (2) The *seniority* remedial decisions, in which the Court at once gave its most expansive reading to Section 706(g), and yet specified remedial limitations upon its equitable relief powers deriving from the seniority-protective Section 703(h). (3) The affirmative action decisions, both the constitutional decisions and *Weber*, the single Title VII affirmative action decision before *Stotts*. (4) The final heading represents the coalescence of the general remedial decisions, the seniority remedial decisions, and the affirmative action decisions—in *Stotts*.

Amicus contends that, properly interrelated, these decisional landmarks establish conclusively that there is no statutory bar in Title VII to judicially prescribed affirma-

tive goal relief as a remedy for identified past racial discrimination, an unlawful employment practice under Section 703 (Section 703(c) in this case.)

A. The General Remedial Decisions (*Griggs*, *Albemarle*, and *Franks*): The Two Chief Purposes of Title VII

Griggs v. Duke Power Co., 401 U.S. 424 (1971) was a "violation", rather than a "remedy" case, and we note it here only for the Court's focus on "The objective of Congress in the enactment of Title VII" (401 U.S. at 429): "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees." (401 U.S. at 430). Of course, "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." (401 U.S. at 429-430). "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (401 U.S. at 431). This twice-stated reference to removal of barriers "when barriers operate invidiously . . ." is the Court's first identification of the "primary objective" of Title VII.

Four years later, came *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), which was expressly a "remedy" decision, directly involving interpretation of Section 706(g). In question was whether a district court "has virtually unfettered discretion to award or deny back pay" (422 U.S. at 414). The statutory language of Section 706(g) specified back pay as a remedy, but it said that the Court "may" award back pay, not that it "must". In *Albemarle* this Court reversed the district court for abuse of discretion for denying back pay after a proven violation. The ground given by the district court was that the defendant employer had not been in "bad faith". In holding that presumptively back pay would be available for a proven violation, the Supreme Court undertook its most complete review of the purposes of Title VII.

The remedial section (Section 706(g)), held the Court, must "be measured against the purposes which inform Title VII". Justice Stewart's opinion then referred to the *Griggs* "removal of barriers" passage, and noted that back pay "has obvious connection" with this "primary objective." "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history' . . ." (422 U.S. at 417-418). Only after this dependence on the "primary objective" to measure the remedial situation, did the Court identify a second objective of Title VII which led to the same conclusion:

It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful unemployment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. (422 U.S. at 418)

The Court then cited other precedents concerning "the historic purpose of Equity to 'secure complete justice'" [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (422 U.S. at 418). The Court found "clear meaning" for the terms "complete justice" and "necessary relief" where proven racial discrimination was concerned: the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." (422 U.S. at 418).

Albemarle thus added a second major Congressional objective to the Court's perspective on 706(g). There was the "removal of barriers" objective of *Griggs*, still given first place. But there was the newly recognized "make

whole" objective of Section 706(g). After reviewing the legislative history of 706(g) to reaffirm these points, the opinion of the Court continued:

As this makes clear, Congress' purpose in vesting a variety of 'discretionary' powers in the courts was . . . to make possible the 'fashion[ing] [of] the most complete relief possible,' . . .

It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. (405 U.S. at 421).

A landmark in this Court's jurisprudence of Section 706(g), *Albemarle* gives the lie to suggestions of petitioner and the EEOC that only "make whole" relief is available under the statutory scheme.

Franks v. Bowman Transportation Co., 424 U.S. 753 (1975), the final case to be noted under this heading, properly belongs in this discussion of *general* remedial cases, although it concerns seniority (and will be returned to under the next grouping).

Like *Albemarle*, *Franks* is most properly a remedial case. In fact, it constitutes a direct and immediate extension of *Albemarle*. *Franks* took careful note of the fact that Congress had made an exception for bona fide seniority systems in its violation section (Section 703(h)). Much as in *Local 28*, in *Franks* there was an express finding of racial discrimination after full trial. Much as in *Local 28*, defendant employer pointed to an exception (703(h)) in the violation section (Section 703) as limiting the relief which could be given under 706(g). After reviewing the legislative history in *Franks*, the Court concluded that "the thrust of the section (703(h)) is directed toward defining what is and what is not an illegal discriminatory practice. . . There is no indication in the legislative materials that Section 703(h) was intended to modify or restrict relief otherwise appropriate once an

illegal discriminatory practice occurring after the effective date of the Act is proved—as in the instant case—a discriminatory refusal to hire.” (424 U.S. at 745-746).

This decisiveness of *Franks* in sharply separating the violation section of Title VII (Section 703) from the remedy section (Section 706(g)) should have warned off petitioner and the EEOC from their attempted replay here of this losing argument of the employer in *Franks*. Yet, in almost identical fashion, petitioner herein, and the EEOC, cite various legislators’ reassurances that an employer or union would not be required to establish racial balance to avoid being in violation of Section 703.

Retroactive, competitive, rightful place seniority, then, is ordinarily (as with back pay) an ingredient of “make whole” relief under 706(g). The prospective beneficiaries of the *Franks* decision were the unnamed black members of the class, which as a class of rejected applicants, had successfully proven the employer’s racial discrimination in making desirable job transfers. What remained for these individual black class members to do in order to obtain competitive seniority? Not a great deal. The Court placed no burden on these unnamed applicants to prove that they “have been actual victims of (the proven) racial discrimination.” On the contrary, since “petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents [employer and union] . . . the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination.” (424 U.S. at 772).

B. The Seniority Remedial Decisions (*Franks* and *Teamsters*): The Bite of Class or Group Relief in Face of Proven Racial Discrimination

Like *Franks*, *Teamsters v. United States*, 431 U.S. 324 (1977) (*Teamsters*) is both a general remedial decision and a seniority decision. As a general remedial decision it reaffirms that a remedy may be “appropriate” in light of Title VII’s “primary purpose” to “remove barriers

that have operated in the past to favor an identifiable group of white employees over other employees” (*Griggs*, 401 U.S. at 429-430), or in light of Title VII’s purpose of “making persons whole for injuries suffered through past discrimination” (*Albemarle*, 422 U.S. at 421, *Franks*, 424 U.S. at 771).

Admittedly, when an individual claims a quasi-entitlement, say to competitive, rightful place seniority (as in *Franks*), under the “make whole” rationale, he cannot recover if there is proof that he is not a victim of the proven discrimination. However, the class or group aspect of the Section 706(g) remedy which is keyed to the “remove barriers” purpose, has considerable force even with respect to the prospect of an individual receiving competitive seniority (in Phase 2) after proof of a pattern or practice of racial discrimination against the group or class in Phase 1. For once the group or class has prevailed in Phase 1, the burden of proof rests upon the employer to show that a rejected applicant member of the group or class was not a victim of the identified discrimination. And *Teamsters* (going beyond *Franks*) allows that burden on the employer to disprove “victimness” even with respect to non-applicants who show that they were deterred from applying and are qualified. The *Franks-Teamsters* recognition of this burden of proof on such employers constitutes a general remedial decision as to the force of the group or class “remove barriers” purpose of Title VII.

As a seniority decision *Teamsters* affirms the force of Section 703(h) (bona fide seniority system), in certain cases, as negating relief in Phase 2 to an individual claiming “make whole” relief who is shown not to have been a victim of the racial discrimination identified in Phase 1. In fact, as to such an individual, Section 703 (h) negates even a violation. Another aspect of *Teamsters* directly derives from the protection accorded a bona fide seniority system. Under *Franks* once post-Act class race discrimination is proven in Phase 1, an applicant member of that class may be given competitive seniority

displacing an employee whose seniority is otherwise protected by Section 703(h)). *Teamsters* in extending the carryover to Phase 2 of a presumption in favor of a deterred non-applicant, specified that the non-applicant (potential victim) must evidence more than present willingness to take the job, and qualifications. The reason given by the Court was that a successful nonapplicant would acquire the competitive, rightful place seniority status. In a protracted Phase 2 proceeding, the court granted that the non-applicant would have a "not always easy burden" (431 U.S. at 368), but added that a district court may find "credible and convincing" as little as "an employee's informal inquiry, expression of interest, or even unexpressed desire . . ." *Teamsters*, 431 U.S. at 371 n.58.

So *Teamsters*, like *Franks*, strongly supports this Court's recognition of the appropriateness and force of class or group ("remove barriers," *Griggs*, 401 U.S. at 429-430) relief under Section 706(g). Where such relief has been limited, the explanation lies in the Court's strong reliance on the "bona fide seniority system" exception of Section 703(h).

Petitioner and the EEOC seek to avoid this obvious consequence by suggesting against the plain language of 706(g) and the ruling decisions of this Court, that only "make whole" relief is available under Section 706(g).

C. The Availability and Limits of Race-Conscious Affirmative Goal Relief: The Affirmative Action Decisions (*Bakke*, *Weber* and *Fullilove*)

While the Courts of Appeal have without exception⁹ viewed the broad scope of Section 706(g), as interpreted by this Court, as permitting race-conscious affirmative goal relief, they have been aware of possible limitations on such relief deriving from this Court's decisions, both statutory and constitutional.

⁹ Justice Blackmun made a useful selection of these cases in his *Steffs* dissent (104 S. Ct. at 2606 n.10).

United Steelworkers v. Weber, 443 U.S. 193 (1979) (*Weber*) is the only Title VII decision of this Court directly dealing with race-conscious affirmative goals. In upholding a race-conscious training program *Weber* answered one crucial question: Were *all* race-conscious remedies for past racial discrimination themselves "discrimination" such as to constitute an unlawful employment practice under Sections 703 and 704 of Title VII. The *Weber* Court held, "No"—at least as to voluntary programs, reserving the question faced here of judicially decreed relief under Section 706(g). But the Court indicated factors that might invalidate any race-conscious plan by stating why it viewed the plan in *Weber* as falling "on the permissible side of the line" (443 U.S. at 208): the objective of the plan was "to eliminate conspicuous racial imbalance in traditionally segregated job categories" (443 U.S. at 209). The plan was temporary (443 U.S. at 209). Further, "the plan does not necessarily trammel the interests of white employees." (443 U.S. at 209).

In the year prior to *Weber*, in an equal protection context, the Court, although severely divided, seemed to have established two constitutional propositions: (1) a rigid racial quota (reserving 16 of 100 medical school admissions exclusively to minorities) was per se unconstitutional; and (2) race might be used as a factor without violating equal protection under certain circumstances, provided there were authoritative findings of past racial discrimination. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In the year following *Weber*, in *Fullilove v. Klutznick*, 448 U.S. 448 (1979) the Court upheld a Congressionally-enacted set-aside that gave racial preference to specified minority groups. The Court was satisfied with Congressional findings of past demonstration which the set-aside was "reasonably" designed to remedy. The controlling opinion of Chief Justice Burger emphasized the plan's "flexibility"—i.e., minority persons who were shown not to have been disadvantaged by the past racial discrimination which the racial preference was

designed to remedy were not benefited. Further, the Court seemed to incorporate the *Weber* factors as applicable in this constitutional context.

Although *Bakke* and *Fullilove* were constitutional cases Courts of Appeals have carefully noted their warnings in passing on Title VII remedial preferences.

D. The Coalescence in *Stotts* of the General Remedial (A.), Seniority Remedial (B.), and Affirmative Goal (C.) Decisions

Against the background of these cases it is not difficult to analyze *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984) (*Stotts*), which can be considered a coalescence of these three groups of cases.

In *Stotts* a class action alleging a pattern of race discrimination was brought by black firemen against the City. The district court approved a consent decree which established affirmative goal relief as a remedy for patent (but officially unadmitted) racial discrimination. In an economic crisis the city issued a general layoff order: last hired, first fired, in accordance with the established seniority system. The district court enjoined the city from laying off certain firemen who had been hired pursuant to the affirmative goal remedy. The court of appeals affirmed this injunction, the effect of which was to give certain beneficiaries of the affirmative goal remedy protected competitive seniority. Nonminority firemen claimed that the bona fide seniority system protected them from the injunction, and appealed. This Court agreed with the majority firemen, and reversed.

In his plurality opinion Justice White first denied that the injunction could be upheld as a construction of the consent decree. He then rejected plaintiff black firemen's claim that the court's injunction was a legitimate exercise of its inherent power to modify the consent decree. In ruling that the injunction was an improper exercise of judicial power Justice White stated that even after trial the district court could not have given the minority firemen layoff protection against more senior employees as-

serting seniority rights pursuant to a bona fide seniority system. In a collision between seniority rights claiming the protection of Section 703(h), and the status of black firemen hired in accordance with an affirmative goal consent decree, the seniority rights prevailed.

Subsequent discussion in the plurality opinion of *Franks* and *Teamsters* and the legislative history of Title VII, was clearly directed to the conclusive bearing on those cases of the seniority protection given to bona fide seniority systems by Section 703(h). To escape *Teamsters'* bar to "make whole" relief and fit within *Franks* it was essential, said Justice White, that the firemen who had been hired pursuant to the affirmative goal remedy be victims of the racial discrimination which had justified the affirmative goal remedy. Since there was no such showing in the record, there was no basis for a "make whole" remedy that would have the effect of awarding the black firemen plaintiffs "competitive seniority." This could not be done under either *Franks* or *Teamsters*.

There is not a line in Justice White's plurality opinion, nor in the concurrence of Justice O'Connor, which suggests that in *Stotts* this Court was overruling its general remedial decisions—*Griggs*, *Albemarle*, *Franks* and *Teamsters*—which had each recognized as the "primary objective" of Title VII "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" (*Albemarle*, 422 U.S. at 417; citing *Griggs*, 401 U.S. at 429-430). There is no suggestion in the controlling opinions in *Stotts* that the Court was withdrawing from its steadfast insistence that relief under Section 706(g) was measured primarily by this purpose, as well as by the purpose of individual "make whole" relief.

After *Stotts*, as much as before, it is open to the Court under Section 706(g) to approve equitable relief that is measured by "the central statutory purposes of eradicating discrimination throughout the economy and making

persons whole for injuries suffered through discrimination." (*Albemarle*, 422 U.S. at 421, *Franks*, 424 U.S. at 771).

Stotts dealt with the "make whole" purpose—in the context of a bona fide seniority system. This case (*Local 28*) deals with the "primary" "remove barriers" objective in the context of "egregious" past discrimination. Amicus argues below that in that context, in *Local 28*, the Court should find the "membership goal" "appropriate."

III. THE AFFIRMATIVE MEMBERSHIP GOAL RELIEF GRANTED BELOW AS A REMEDY FOR PROVEN "EGREGIOUS" RACIAL DISCRIMINATION IS VALID UNDER SECTION 706(g) OF TITLE VII, AS PREVIOUSLY INTERPRETED BY THIS COURT

As amicus argued in II, above, there is no *a priori* bar to race-conscious affirmative membership goals in either the language of Section 706(g) or in the decisions of this Court interpreting its scope. However, limits have been set, or guidelines authoritatively outlined, in decisions of this Court with respect to affirmative goal relief. These limits, deriving from the Title VII cases (*Franks*, *Teamsters*, *Weber* and *Stotts*) and the constitutional (equal protection) cases (*Bakke* and *Fullilove*) which have been discussed above (at pp. 19-20), apply to judicially prescribed affirmative goals, subject to traditional equitable principles. The membership goal set in the courts below falls well within this Court's limits on affirmative goal relief and traditional equitable principles, and therefore should be affirmed as not clearly erroneous.

A. Race-conscious Affirmative Action Goals as a Remedy for Past Racial Discrimination May Constitute "Appropriate" Relief Under Section 706(g), Provided They Conform to Limits Set by This Court

In previous discussion of *Albemarle*, *Franks* and *Teamsters* (at pp. 13-18), amicus has argued that this Court has given recognition to the sweeping remedial authority Congress gave the courts in Section 706(g) to enforce

"the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." (*Albemarle*, 422 U.S. at 421; *Franks*, 424 U.S. at 771). Although, like the retroactive competitive seniority relief awarded in *Franks* (despite Section 703(h)) affirmative goals are not specified by name in Section 706(g), they are (like the competitive seniority in *Franks*) well within the above statutory purposes. Particularly are they "appropriate" to "remove barriers" (*Griggs*, 401 U.S. at 429-430), where egregious past discrimination and present recalcitrance are evident. The Court has taken account of the scope and flexibility of equitable relief in applying Section 706(g). In *Franks* the Court noted that "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. . . . Moreover, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. . . . In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests. . . . [C]laims under Title VII involve the vindication of a major public interest. . . ." *Franks*, 424 U.S. at 777-778 nn. 39-40.

B. The Limits of Permissible Affirmative Goal Relief Under Title VII and the Constitution, as Established in *Bakke*, *Weber* and *Fullilove*, Channel the Judicial Prescription of Affirmative Goal Relief Under Section 706(g)

Amicus has discussed more fully elsewhere (pp. 19-20) the patient development by this Court of limits to race-conscious affirmative goal relief in *Bakke*, *Weber* and *Fullilove*. Although no case in this Court has specifically ruled on the scope of affirmative goal relief in judicial remedial decrees, the limits suggested by these cases should furnish the Court with adequate guidelines to fill the lacuna.

C. The Membership Goal Set in the Courts Below Fits Well Within the Limits of Permissible Affirmative Goal Relief and Traditional Equitable Principles

The 29.23% membership goal set as an affirmative goal by the district court, and affirmed by the court of appeals, fits well within the confines of permissible race-conscious affirmative goals under the guidelines of this Court both as to Title VII (*Weber*) and as to equal protection (*Bakke*, *Fullilove*). The goal was set in face of "egregious" past racial discrimination by the union, and gravest recalcitrance with respect to the "remove barriers" objective which this Court has identified as "the primary objective" of Title VII. (*Albemarle*, 422 U.S. at 417, citing *Griggs*, 401 U.S. at 771). There is here no rigid "quota", as petitioner and EEOC argue, but a reasonable membership "goal" to be achieved, "reasonable" in light of the extent of the past discrimination. The membership goal relief is well within permissible channels or limits, as established by this Court.

IV. OBJECTIONS OF PETITIONERS AND THE EEOC TO THE AFFIRMATIVE GOAL REMEDY DECREED BY THE COURTS BELOW IGNORE THE STATUTORY LANGUAGE OF SECTION 706(g), MISREAD ITS LEGISLATIVE HISTORY, AND CONTRAVENE THIS COURT'S CONSISTENT INTERPRETATION OF SECTION 706(g) IN LIGHT OF THE BASIC PURPOSES OF TITLE VII

Rejecting the straightforward account of what Congress has done, and how this Court has interpreted Title VII, petitioner and EEOC present to the Court a "might have been" scenario of these events. Their basic confusion derives from a convenient forgetfulness of what this Court has repeatedly identified as "the primary objective" of Title VII: "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" (*Albemarle*, 422 U.S. at 417, citing *Griggs*, 401 U.S. at 429-430).

Petitioners rely upon a reading of legislative history that concerns Section 703 (the violation section) rather than Section 706(g) (the remedial provision). Beyond that, they rest their case upon the mistaken conclusion that *Stotts* has already banished affirmative action goals.

The EEOC agrees that the affirmative goal issue requires a construction of Section 706(g); yet it resorts to legislative history comments that were made with reference to Section 703. More puzzling is the EEOC's misleading account of the major decisions of this Court dealing with Title VII, highlighted by the curious omission of any concern with what the Court has identified as Title VII's "primary objective" (pp. 6, 13, above). Finally, the EEOC brief presents (G.Br. #2, pp. 6-8) a ridiculously restrictive picture of equity jurisprudence that is at odds with actions and statements of this Court in construing the scope of an "appropriate" equitable remedy under Title VII (p. 14, above).

Amicus has dealt at length above (II) with the applicable decisions of this Court. Here amicus will concentrate on the specific implications of these decisions upon the "appropriate"-ness of a Section 706(g) affirmative goal remedy, free of the shackles petitioner and the EEOC would "inappropriately" put upon it by a futile requirement of "specific victim" relief.

In *Teamsters* Justice Stewart's majority opinion emphasized (reaffirming *Franks*) that "by 'demonstrating the existence of a discriminatory hiring pattern and practice' [in Phase 1] the plaintiffs had made out a prima facie case of discrimination against the individual class members. . . ." (431 U.S. at 359). The force of Phase 1 itself (group remedy), by this showing, brought about the consequence that "the burden therefore shifted 'to the employer to prove that individuals who reapply were not in fact victims of previous hiring discrimination'." The proof (in Phase 1) of the alleged "broad-based policy of employment discrimination . . . [constituted] reasonable grounds to infer that individual hiring decisions were

made in pursuit of the discriminatory policy and to require the employer to come forth with evidence dispelling that inference." (*Id.*) The Court clearly recognized in *Teamsters* that this carryover from Phase 1 to Phase 2 was a deliberate affirmation of Section 706(g)'s capacity to generate group consequences:

The holding in *Franks* that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally. *Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof. . . . These factors were present in Franks Moreover, the findings of a pattern or practice changed the position of the employer to that of proven wrongdoer.* (431 U.S. at 359 n.45.).

Teamsters extends this burden of proof even to non-applicants who give evidence that they are qualified, and satisfy the court in Phase 2 that they were deterred by employer's discriminatory practices from applying. However, because of the special advantages which individuals are seeking in Phase 2, i.e. retroactive competitive seniority at the expense of otherwise more senior employees, the Court specified more evidence of deterrence was needed than mere present willingness to accept the job. (431 U.S. at 370).

The intimation of petitioners and EEOC that this limited requirement of *Teamsters* with respect to nonapplicants (who would receive competitive seniority) entails comparable proof (in a Phase 2) by all beneficiaries of affirmative goal relief (who would not, after *Stotts* receive competitive seniority or its equivalent) is a complete non-sequitur. Under affirmative action goals no individual has any right to be hired or admitted to a union or employment program. No competitive seniority is achieved (*Stotts*). The employer or union routinely passes on qualifications of each hiree or admittee. The thrust of affirmative goal relief under Section 706(g) is merely that

in view of the employer or union's demonstrated "egregious" hiring or admittance practices, the primary objective of Title VII to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" (*Griggs*, 401 U.S. at 429-430, *Albemarle*, 422 U.S. at 417) makes it "appropriate" to establish a goal that a certain percentage of the group proven to have been "egregiously" discriminated against be included among the qualified persons hired, promoted or admitted to an employment program.

What consideration then would make it "appropriate" to require a Phase 2 as a condition of granting affirmative goal relief? The answer is that nothing would be gained by it, and much would be lost. Petitioners' and EEOC's position here would have the Court discard its historic commitment to "remove barriers" as the primary purpose of Title VII. It would saddle the affirmative goal remedy with a procedural requirement that is purposeless and exhausting (both of claimants and courts).

This Court has stood vigilantly over its delegated equitable remedial powers under Section 706(g), using them as "appropriate" in light of "the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination" (*Albemarle*, 422 U.S. at 421; *Franks*, 424 U.S. at 771). Of these "twin purposes of Title VII" (*Franks*, 424 U.S. at 799) it is the "remove barriers" purpose (*Griggs*, 401 U.S. at 429-430) that petitioner and EEOC seek to consign to oblivion.

We have here not an Executive Order to be modified by the Executive at its whim, but a statute enacted by Congress after the "Longest Debate" in its history, and painstakingly interpreted by this Court in 15 years of decisions. Congress can modify Title VII, and it has done so. But the function of the Executive remains to "take care the laws be faithfully executed." The EEOC here asks this Court here to amend Title VII and to discard its past decisions concerning Section 706(g). However "respectfully submitted", this suggestion is absurd.

V. THIS COURT'S CONSTITUTIONAL DECISIONS BEARING ON RACE-CONSCIOUS AFFIRMATIVE GOAL REMEDIES REINFORCE THE JUDGMENT BELOW

Only two cases decided by this Court set constitutional limits upon race-conscious affirmative relief: *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Neither of these cases suggests an equal protection obstacle to the "appropriate" remedy under Section 706(g) of Title VII which was granted below.

Three principal rulings of the divided Court in *Bakke* have clear application to the affirmative goal problem presented to the Court of Appeals. None of them constitutes a bar to an affirmative goal remedy. (1) In *Bakke* a majority of the Court agreed that race-conscious affirmative action was constitutionally permissible as a remedy for demonstrated racial discrimination. (2) Justice Powell's controlling opinion required that there be findings of past discrimination by a responsible governmental body as a predicate to race-conscious preferential relief. (3) Justice Powell's controlling opinion insisted that a rigid racial quota (e.g. the reservation of 16 of 100 seats in the medical school class for blacks and other minorities) was per se a violation of equal protection.

In *Local 28* the affirmative goals were established as a remedy for "egregious" past racial discrimination by the union. There were express findings of past discrimination by the district court, affirmed by the Court of Appeals. There was no rigid racial quota, but goals to be striven for with a reasonable effort in light of egregious demonstrated racial discrimination which the union showed no disposition to correct.

Fullilove concerned the Congressionally established race-conscious set-aside in light of what the Court accepted as adequate Congressional consideration (which the Court found equivalent to satisfying the "findings" requirement

of *Bakke*). The Chief Justice's opinion, which was joined by three Justices and was operatively the opinion of the Court, pointed to the flexibility of the set-aside: it left room for exclusion of the unqualified, and those who were shown not to have been victims of the racial discrimination in the construction trade. The Chief Justice also noted compliance with other reassuring factors much like those that had been cited in *Weber* as marking the outer limits of legitimate affirmative action.

The Chief Justice expressly identified situations in which the Court had already approved race-conscious relief:

The approved racial set-aside in *Fullilove* had been established by Congress, and Chief Justice Burger noted that the same latitude might not be given to race-conscious *judicial* relief (a question that was not before the Court). However, Chief Justice Burger had made clear in *Milliken v. Bradley*, 418 U.S. 717 (1974) in denying a race-conscious remedy, that "The controlling principle [is] that the scope of the remedy is determined by the nature and extent of the constitutional violation." For this principle he cited "Swann". In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Chief Justice, for a unanimous Court, upheld race-conscious school busing in a particularly recalcitrant school district. Race-conscious busing was not upheld "to require . . . any particular degree of racial balance or mixing", but simply as "one tool of school desegregation in light of perceived inadequacy of lesser remedies and the degree of the constitutional violation. The Court did not overlook difficulties with the remedy, but recognized that "reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally [employed]". In the companion case, *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), a unanimous Court speaking through the Chief Justice held unconstitutional

North Carolina's Anti-Busing Law, which prohibited student school assignments on the basis of race. Chief Justice Burger rejected the claim that a "color-blind" concept of the Constitution should sustain the state law: "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive the school authorities of the one tool absolutely essential to fulfillment of their [constitutional obligation]."

A constitutional remedy may not be a statutory remedy. But when each is the product of the equitable powers of the Court in light of the degree of the violation, a distinction between them hardly makes sense.

For this reason, the conclusion of some Courts of Appeals seems cogent: That if affirmative action goals meet the statutory requirements of Title VII (as discussed above), they also pass the constitutional test of equal protection. The restrictions on conscious goals as a remedy for identified discrimination under Title VII are strict enough to satisfy the constitutional requirements for judicial relief.

CONCLUSION

The judgment of the court of appeals should be affirmed with respect to its approval of the district court's race-conscious membership goal.

Respectfully submitted,

JOSEPH A. BRODERICK

*Attorney for Amicus Curiae,
North Carolina Association
of Black Lawyers*

January 3, 1986

* See, e.g., *Kromnick v. School District*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985).

AMICUS CURIAE

BRIEF

(10) (13)
Nos. 84-1656, 84-1999

Supreme Court, U.S.

FILED

JAN 3 1986

JOSEPH F. SPANIOLO,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

—against—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
THE CITY OF NEW YORK, and NEW YORK STATE
DIVISION OF HUMAN RIGHTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner,

vs.

CITY OF CLEVELAND, et al.,

and

VANGUARDS OF CLEVELAND,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE NATIONAL
CONFERENCE OF BLACK MAYORS, INC.
IN SUPPORT OF RESPONDENTS**

CONRAD K. HARPER,
Counsel of Record

ELIZABETH PRYOR JOHNSON
STEVEN L. LAPIDUS

SIMPSON THACHER & BARTLETT
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

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Interest of Amicus

The National Conference of Black Mayors, Inc. ("NCBM") respectfully submits this brief in support of respondents. Its members represent 22 million people of all races in 283 communities, including Los Angeles, Chicago, Philadelphia, Washington, D.C., New Orleans and Atlanta, as well as Highland Beach, Maryland, Pennermon, Mississippi and Pembroke, Illinois.

The Justice Department is currently challenging nationwide the long-accepted legal principles justifying affirmative action. Fifty-one jurisdictions (including Los Angeles, Chicago and Philadelphia) have been asked by the Department to revise existing consent decrees for the purpose of eliminating goals and timetables from affirmative action plans. Department of Justice Press Release, April 2, 1985. NCBM members have worked hard for agreement on these plans and, in doing so, for racial peace. These efforts will be seriously jeopardized if this Court overturns the decisions of the courts below.

NCBM has formed a coalition of national organizations, the National Committee to Defend and Extend Affirmative Action, which provides continuing support for programs of equal access to jobs.

NCBM's members should be accorded substantial latitude in staffing municipal work forces. All of the municipalities in which NCBM's members hold office have substantial black populations. It is critical that these municipalities have the right to choose employees from a qualified and diverse pool of applicants which reflects the municipalities' racial composition. This is true not only because of the imperative of public peace, but also because of the need for public cooperation, founded on the true consent of the governed. NCBM therefore urges this Court to permit

public employers to implement reasonable, appropriately-tailored, voluntary race-conscious plans in response to acute racial disparities in their work forces that are a direct consequence of the country's lamentable history of racial discrimination in public employment.

Consent of the Parties

All parties in both actions have consented, in letters on file with the Clerk, to the filing of this brief.

Summary of Argument

The affirmative action plans at issue are valid under the thirteenth, fourteenth and tenth amendments. The fourteenth amendment does not command "color blindness." The plans need only be substantially related to achieving important state interests, which include the need (1) to eliminate the disabling effects of racial discrimination in public and publicly-funded employment; (2) to enlarge the pool of applicants for public employment, thus increasing the quality of workers in public service and improving public service itself; (3) to set a positive example for private employers; and (4) to preserve racial harmony and maintain public order.

The fourth interest is particularly compelling for the cities represented by NCBM's members. Lack of equal employment opportunities historically has been a cause of unrest in our nation's major urban areas. Reasonable, precisely-tailored affirmative action plans, such as those at issue here, are a fair means of diffusing racial tensions.

The plans are also authorized under the thirteenth amendment. That amendment, which was a response to the racial strife of the Civil War era, embodies a sweeping prohibition against slavery's heir, racial discrimination. In 42

U.S.C. § 1981, Congress has clothed the federal courts with power to extirpate such discrimination.

Municipal authority to promulgate affirmative action plans is bottomed on the tenth amendment. If our system of federalism is to remain vital, municipalities must be permitted to experiment with affirmative action as a means of maintaining public order and securing racial concord.

The affirmative action plans may also be constitutionally required. The fourteenth amendment demands more than simply ending past official racial discrimination. Positive steps, such as affirmative action, are essential to achieving equal opportunity in public and publicly-funded employment.

Title VII was extended to cover public employees under the fourteenth amendment. Affirmative action was explicitly endorsed by Congress. Municipal employers should be accorded the same approval of affirmative action as this Court has given for private employers, especially as the federal executive role in this area diminishes.

Any expansive interpretation of *Firefighters Local Union No. 1784 v. Stotts* that would invalidate the plans at issue is bereft of textual support and is at war with Title VII.

ARGUMENT

POINT I

The Affirmative Action Plans Are Valid Under the Fourteenth, Thirteenth and Tenth Amendments.

The cities of New York and Cleveland are empowered to consent to the affirmative action plans at issue under the fourteenth, thirteenth and tenth amendments. As narrowly-tailored, reasonable and temporary methods of

eliminating the effects of past discrimination in public and publicly-funded employment, the plans are reasonable means of serving important state interests under the fourteenth amendment. As a method of eradicating remaining badges and incidents of slavery, the plans are authorized by the thirteenth amendment. Finally, as creative means of securing public order, promoting racial harmony and improving the quality of public service, the plans are justified by the tenth amendment.*

A. The Equal Protection Clause of the Fourteenth Amendment Does Not Prohibit the Affirmative Action Plans.

The equal protection clause of the fourteenth amendment does not prohibit the affirmative action plans at issue. Both plans are circumspectly drawn, reasonable and temporary. They were prompted, in part, by the compelling needs of

* The *Vanguards*' complaint alleged jurisdiction, *inter alia*, under the thirteenth and fourteenth amendments, *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 481 (6th Cir.), *cert. granted*, 106 S. Ct. 59 (1985). Local 28's complaint alleged jurisdiction, *inter alia*, under the fourteenth amendment. *EEOC v. Local 638*, 753 F.2d 1172, 1185 (2d Cir.), *cert. granted*, 106 S. Ct. 58 (1985) (*Sheet Metal Workers*). The tenth amendment was not pleaded by any party. This Court has made clear, however, that it is not confined by the pleadings when taking, for example, the fateful step of striking down a statute as unconstitutional. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); compare Rule 34.1(a) of this Court ("... the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."). If, as we contend, the authority of the tenth amendment vindicates the plans at bar, the grave interests at stake should lead this Court to confirm that authority.

Moreover, the Equal Employment Opportunity Commission ("EEOC") claims that *Sheet Metal Workers* "... is purely a Title VII case," Brief for the EEOC at 25, footnote, *Local 28 v. EEOC*, but it frames the fifth question presented in its *Sheet Metal Workers* brief as: "Whether such remedies are unconstitutional." Thus, constitutionality, *vel non*, is before the Court.

Cleveland and New York to eliminate the disabling effects of hoary and flagrant histories of racial discrimination in employment.

In *Vanguards*, the District Court found "a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department." 753 F.2d at 483. In *Sheet Metal Workers*, the Second Circuit, in decision after decision, cataloged "long continued and egregious race discrimination." 753 F.2d at 1186; *EEOC v. Local 638*, 565 F.2d 31, 36 n.8 (2d Cir. 1977); *EEOC v. Local 638*, 532 F.2d 821, 825 (2d Cir. 1976). The City of New York was not the employer guilty of discrimination in *Sheet Metal Workers*. It was recognized, however, that "Local 28 . . . exercises complete control over entry into the sheet metal trades in New York City." 532 F.2d at 824. The City was granted the opportunity to intervene in *Sheet Metal Workers* based, in part, on its status as a regular contracting party with the sheet metal industry. *United States v. Local 638*, 347 F. Supp. 164, 166 (S.D.N.Y. 1972). Thus, New York City is not unlike Cleveland, to the extent both municipalities are attempting to eliminate the effects of past racial discrimination in public, or publicly-funded, employment.

The affirmative action plans are consistent with the purposes of the fourteenth amendment and are substantially related to achieving important state interests, including the need (i) to eliminate the disabling effects of racial discrimination in public and publicly-funded employment; (ii) to enlarge the pool of applicants for public employment; (iii) to set a positive example for private employers; and (iv) to preserve racial harmony and maintain public order.

1. *The Legislative History of the Fourteenth Amendment and Statutes Promulgated Concurrent Therewith Support Affirmative Action.*

The fourteenth amendment was not intended to be "color blind." This Court has recognized that "color blindness" can be exploited as a pretext to justify continued discrimination. *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971). As a result, affirmative action will be needed until society satisfies "the century-old promise [of the fourteenth amendment] of equality of economic opportunity." *Fullilove v. Klutznick*, 448 U.S. 448, 463 (1980) (Burger, C.J.); see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 405 (1978) (Blackmun, J.).

The historical context within which the fourteenth amendment was adopted belies any characterization of the amendment as color blind. The amendment was passed during Reconstruction, as part of the national effort to eliminate racial discrimination. Professor Ely has explained:

[T]he express preoccupation of the framers of the [fourteenth] amendment was with discrimination against Blacks, that is, with making sure that Whites would not, despite the thirteenth amendment, continue to confine Blacks to an inferior position.

Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 728 (1974).

The legislative history of several Reconstruction statutes, passed at or around the time Congress proposed the fourteenth amendment, vitiates the notion that the fourteenth amendment prohibits all race-conscious legislation. See generally Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985). The foremost example is the Freedmen's Bureau Act of 1866 ("1866 Act"), Act of July 16, 1866, Ch. 200,

14 Stat. 173 174-76, passed by Congress less than one month after it approved the fourteenth amendment. Compare Cong. Globe, 39th Cong., 1st Sess. 3149 (1866) (House approved Senate changes to fourteenth amendment and voted it into law on June 13, 1866) with *id.* at 3524, 3562 (Conference Report on Freedmen's Bureau Act accepted on July 2 and 3, 1866).

The 1866 Act continued the operations of the Freedmen's Bureau, established one year earlier, to provide special assistance and protection to blacks. Act of March 3, 1865, Ch. 90, 13 Stat. 507, 508. The 1866 Act gave blacks preference, for example, in the acquisition of certain real estate, *id.* at 372 (statement of Sen. Hendricks), and the availability of education, *id.* app. at 71 (statement of Rep. Rousseau). As a result, the legislation was opposed on grounds still echoed today by opponents of the race-conscious plans at issue. See, e.g., Brief for the EEOC at 32-34, *Local 28 v. EEOC* (advancing the contention of invalidity as to the order establishing tutorials, counseling, and low-interest loans for nonwhites in the apprenticeship program, funded by contempt fines imposed on whites). Critics argued that the 1866 Civil Rights bill unfairly penalized whites for the benefit of blacks, Cong. Globe, 39th Cong., 1st Sess. 402 (statement of Sen. Davis); *id.* app. at 78 (statement of Rep. Chanler), and that the bill would harm blacks by fostering dependence on government, *id.* at 401 (statement of Sen. McDougall), or provoking white resentment, *id.* app. at 69-70 (statement of Rep. Rousseau).

Supporters of the bill, however, recognized that the government had "liberated four million slaves in the South . . . [and to] stop right here and do nothing more . . . would be a cruel mockery." *Id.* at 588 (statement of Rep. Donnelly). They admitted that the 1866 Act was not

color blind. Its racial distinctions were necessary to ameliorate the condition of those who for so long had been victims of the most brutal form of discrimination, *see id.* at 631-32 (statement of Rep. Moulton), and who lacked the political power otherwise to protect themselves, *id.* app. at 75 (statement of Rep. Phelps) (quoted in *Bakke*, 438 U.S. at 397 (Marshall, J., dissenting)). Based on these arguments, the 1866 Act was passed overwhelmingly over the veto of President Andrew Johnson. It is unlikely that the thirty-ninth Congress intended the fourteenth amendment, enacted in June 1866, to invalidate race-conscious remedial action when the same Congress passed the Freedmen's Bureau Act, which is clearly race-conscious, less than one month later.

To accept the fourteenth amendment as "color blind" is tantamount to ignoring the framers' contrary intent* and to condoning the perpetuation of historical discrimination. As Justice Blackmun warned in *Bakke*: "We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy." 438 U.S. at 407. That would be, however, the inevitable result of an interpretation of the equal protection clause which would bar the affirmative action plans at issue.

2. *The Affirmative Action Plans Serve Important State Interests.*

Recognizing that "[i]n order to get beyond racism, we must first take account of race," *Bakke*, 438 U.S. at 407 (Blackmun, J.), a majority of the Justices of this Court, in *Bakke* and in *Fullilove*, have agreed that, in appro-

* The Attorney General has emphasized the importance of ascertaining the original intent of the framers when interpreting constitutional provisions. *E.g.*, Blumenthal, *The Right's Quest for Law From a Mythical Past*, *The Washington Post*, November 3, 1985, § C, at 1. No less a standard should be relevant to the fourteenth amendment.

priate circumstances, race-conscious remedies are constitutionally permissible. As to the test under which racial classifications embodied in affirmative action plans should be reviewed, this Court has not settled on a standard. Justices Brennan, White, Marshall and Blackmun would demand that "racial classifications designed to further remedial purposes . . . serve important governmental objectives and must be substantially related to achievement of those objectives." *Bakke*, 438 U.S. at 359. Chief Justice Burger and Justice Powell would require much the same showing, yet with greater inquiry into whether the plan is narrowly tailored. *Fullilove*, 448 U.S. at 480-82 (Burger, C.J.); *id.* at 510-15 (Powell, J.); *Bakke*, 438 U.S. at 305 (Powell, J.). The plans satisfy both tests.

a. *Remedying the Effects of Past Discrimination*

The plans serve several important governmental interests. The first is that of remedying identified discrimination. *See Fullilove*, 448 U.S. at 472-78 (Burger, C.J., Powell, White, JJ.); *id.* at 515 (Powell, J.); *id.* at 519-21 (Brennan, Marshall, Blackmun, JJ.); *Bakke*, 438 U.S. at 307 (Powell, J.); *id.* at 362 (Brennan, White, Marshall, Blackmun, JJ.). To establish this interest, the governmental body implementing the plan must show that qualified persons have made findings of past discrimination. *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981). While NCBM would contend that the cities of Cleveland and New York are competent to make this judgment, *see, e.g., McDaniel v. Barresi*, 402 U.S. 39 (1971), that question need not be reached. Federal courts, which are clearly competent to make such determinations, *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419-20 (1977); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971), have made repeated findings of racial discrimination in both cases. *Vanguards*, 753 F.2d at 483;

Sheet Metal Workers, 753 F.2d at 1186; 565 F.2d at 36 n.8; 532 F.2d at 825.

b. Enlarging the Pool of Applicants

Affirmative action in the private sector has enlarged the pool of talent from which employers can draw. As a result, there have been increases in productivity and improvement of customer relations. See Fisher, *Businessmen Like to Hire By the Numbers*, *Fortune*, Sept. 16, 1985, at 28. In *Detroit Police Officers' Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), the Sixth Circuit recognized that affirmative action can increase productivity and improve public relations in the public sector as well. The court found that in Detroit the presence of black police officers, who had long been excluded from police work by racial discrimination in hiring, generated public support and cooperation from the city's large black community and contributed to crime prevention. 608 F.2d at 695.

c. Role Model

Municipalities also have an important interest in setting an example for private employers and the community. See H.R. Rep. No. 238, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2153. The failure of highly visible government agencies to eliminate vestiges of discrimination in their work forces undermines the government's claim to "represent all the people equally." *Id.* NCBM's members, therefore, are uniquely positioned to assume a leadership role in eradicating the effects of past discrimination in public and private employment.

d. Preserving Public Order

Cities need to preserve racial peace and public order through affirmative action. New York and Cleveland, like

the cities represented by NCBM's members, have the same obligation. As the discussion below demonstrates, lack of equal employment opportunities historically has been a cause of unrest in major urban areas in this country.

(i) Civil Disorder and its Causes

Race riots in America have long had their roots in unemployment and employment discrimination. The New York Draft Riots of July 1863 "... had their origin largely in a fear of black labor competition which possessed the city's Irish unskilled workers." Man, *Labor Competition and the New York Draft Riots of 1863*, 36 *The Journal of Negro History*, October 1951, at 375. A similar fear contributed to several other riots, including those in East St. Louis in 1917 and those in Washington, D.C. and Chicago in 1919. See J. Baskin, *Urban Racial Violence in the Twentieth Century* 22-23 (Glencoe Press, 1969); Gompers, *East St. Louis Riots—Their Causes*, 24 *American Federationist*, August 1917, at 621-26. The June 1943 riot in Detroit, which left 34 dead and over 1000 injured, originated, at least in part, in racial discrimination suffered by blacks who, along with whites, had gone to Detroit to work in war-related industries. A. Lee & N. Humphrey, *Race Riot 92* (New York: Dryden Press, 1943).

The 1960's saw social upheaval in many American cities. The riots in Harlem in the summer of 1964 were traced to black unemployment and the income disparity between black families and white families. *Harlem: Hatred in the Streets*, *Newsweek*, August 3, 1964, at 16-20. During the summer of 1967, the cities of Newark, Detroit, Milwaukee, Cincinnati and Boston had large-scale riots. Other cities witnessed serious, though smaller, public disorders. Rossi, Berk, Boesel, Edison & Grover, *Between White and Black—The Faces of American Institutions in the Ghetto*, Supple-

mental Studies for the National Advisory Commission on Civil Disorders 77-79 (Frederick A. Praeger, Pubs. 1968).

In July 1967, President Lyndon Johnson empanelled the National Advisory Commission on Civil Disorders to determine the causes of these riots and how they could be prevented in the future. The National Advisory Commission on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 1 (Mar. 1, 1968) ("Commission Report"). One of the major findings of this Commission was, in the broadest terms, that:

Unemployment and underemployment are among the most persistent and serious grievances of our disadvantaged minorities. The pervasive effect of these conditions on the racial ghetto is inextricably linked to the problem of civil disorder.

Id. at 231. This finding was based upon the Commission's investigation and over 1200 interviews which it conducted shortly after the disorders. Of all the factors found to be causes of the riots, including police practices, housing, and white attitudes, only unemployment, underemployment and/or employment discrimination were found to be a cause in all twenty cities investigated. *Id.* at 81-83. Significantly, discrimination by unions was a major grievance among respondents in thirteen of the cities surveyed and discrimination by local and state governments was cited as a serious problem by respondents in nine of the cities surveyed. *Id.* at 82.

The causal relationship of unemployment and poverty to urban riots is well documented. Rossi, *supra*, at 95-96; see Campbell & Schuman, Racial Attitudes in Fifteen American Cities, Supplemental Studies for the National Advisory Commission on Civil Disorders 48 (Frederick A. Praeger, Pubs. 1968). The Commission found that the

typical rioter, though better educated than the non-rioter, "... was more likely to be working in a menial or low status job as an unskilled laborer. If he was employed, he was not working full time and his employment was frequently interrupted by periods of unemployment." Commission Report, *supra*, at 73. The Commission found, on this point, that "[the rioter] feels strongly that he deserves a better job and that he is barred from achieving it, not because of lack of training, ability, or ambition, but because of discrimination by employers." *Id.* A supplemental study to the Commission Report corroborated the accuracy of this profile. The supplemental survey indicated that 71 percent of blacks thought employment discrimination was a problem and 50 percent of blacks viewed discrimination by their city government as prevalent. Campbell & Schuman, *supra*, at 23.

The reality of these perceived employment difficulties was borne out by the statistics. Unemployment rates for blacks were at least double those for whites in all Census Bureau categories in 1967. Commission Report, *supra*, at 124. The Commission noted the low-status and low-paying nature of most jobs held by blacks, finding that black men were more than three times as likely as whites to be in unskilled or service jobs which pay far below average. *Id.*

Recent data compiled by the United States Department of Labor and the Census Bureau indicate that severe problems of unemployment and underemployment among minorities and a racially-based income disparity persist. In September 1985, for example, the unemployment rate for whites was 6.1 percent, as compared with a 15.3 percent unemployment rate among blacks and a 10.4 percent unemployment rate among persons of Hispanic origin. United States Department of Labor, 108 Monthly Labor Review 73 (Nov. 1985). In addition, 36 percent of black workers

are classified by the Census Bureau as blue collar, while only 31 percent of white workers are so classified. Almost 54 percent of whites are classified as white collar, while only 36 percent of blacks are classified as such. Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Consumer Income, ser. P-60, 1981, Table 52, at 184 (1982). Furthermore, the \$27,686 mean income for whites families dwarfs the \$18,833 mean income for Hispanic families and the \$15,432 mean income for black families. Bureau of the Census, U.S. Department of Commerce, Money, Income and Poverty Status of Families and Persons in the United States, ser. P-60, 1984, at 10 (Aug. 1985).

The persistence of minority unemployment and underemployment, a racially-based income disparity, and continued racial discrimination in public employment, as evidenced all too clearly by the findings in the cases at bar, suggest that the Commission's findings regarding the causes of and cures for urban unrest have not lost their high relevance.

(ii) Prevention of Civil Disorder

After determining that employment problems were a major cause of the race riots in 1967, the National Advisory Commission on Civil Disorders made recommendations for national action to prevent similar civil disorders from recurring. The Commission proposed a comprehensive national policy to address the problems of black unemployment and underemployment. Job creation in both the public and private sectors was recommended, as were training programs. The Commission also urged opening of the existing job structure by eliminating arbitrary barriers to employment. Commission Report, *supra*, at 231-36. As part of this national policy, and particularly pertinent to *Sheet Metal Workers*, the Commission recommended:

Linking enforcement efforts with training and other aids to employers and unions, so that affirmative action to hire and promote may be encouraged in connection with investigation of both individual complaints and charges of broad patterns of discrimination.

Id. at 234. The Commission stated further that "[t]he efforts of the Department of Labor to obtain commitments from unions to encourage Negro membership in apprenticeship programs are especially noteworthy and should be intensified." *Id.*

The Commission also recommended job creation for blacks, stating that it strongly recommended "... that local governments undertake a concerted effort to provide substantial employment opportunities for ghetto residents." *Id.* at 153. To accomplish this goal, the Commission suggested "... that municipal authorities review applicable civil service policies and job standards and take prompt action to remove arbitrary barriers to employment of ghetto residents." *Id.*

New York and Cleveland have endorsed reasonable affirmative action plans as an effective method of stemming some of the historical causes of urban unrest, as outlined by the Commission. This Court has long abstained from interference with the states' traditional "police powers." See *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). In addition, local leaders are necessarily more attuned to the needs of their communities than this Court. As a result, this Court should not substitute its judgment for that of local leaders who, after careful study and lengthy negotiation, have decided to implement affirmative actions plans. See *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) (quoting 110 Cong. Rec. 15893

(1964) (remarks of Rep. MacGregor) (problems raised by such controversial issues as preferential treatment in employment "are more properly handled at a governmental level closer to the American people and by communities . . .")); cf. *Bakke*, 438 U.S. at 404 (Blackmun, J.) ("Programs of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this.").

3. The Affirmative Action Plans Are Reasonable, Narrowly-Tailored and Temporary.

To eliminate successfully the vestiges of past discrimination, employers must be permitted to implement race-conscious hiring and promotion schemes. The Cleveland Fire Department's race-conscious promotion plan in *Vanguards* and the membership goal proposed in *Sheet Metal Workers* are critical in this regard.

The plans are not permanent. They are "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber*, 443 U.S. at 208. The *Vanguards* plan will remain in effect only for four years, 753 F.2d at 485, and the *Sheet Metal Workers* plan will remain in effect only until Local 28 ends its contumacious resistance to court orders and permits the elimination of the effects of past discrimination, 753 F.2d at 1187.

Nor will the plans result in the hiring of unqualified persons, risking stigmatization of minority workers. As the Eighth Circuit has recognized: "The absence—not the presence—of affirmative action stigmatizes minority groups, by perpetuating the disadvantages of minorities. . . . Where the applicant is qualified, the risk of stigma is considerably less because presumably the person can perform the task

adequately." *Valentine*, 654 F.2d at 511. The *Vanguards* plan, in fact, allows a reduction of the percentage of promotions reserved for minorities if an insufficient number of "qualified" minorities is available. 753 F.2d at 485.

In addition, the interests of non-minority workers will not be trammelled. Petitioners are white male workers. Such non-minorities are rarely stigmatized by the operation of a racial preference. The *Vanguards* plan, though it arguably diminishes non-minority workers' expectations with respect to promotion, does not bar their advancement. 753 F.2d at 485. During phase one of the plan, all promotions are made by coupling the highest ranking minority and non-minority candidates. Thereafter, Cleveland is to maintain a specific percentage of minority firefighters at each grade level in accordance with future promotions examinations. Even then, if there is an insufficient number of "qualified" minority candidates, the percentage goals can be reduced by the City to the extent necessary for the safe and efficient operation of the Fire Department. 753 F.2d at 485. Similarly, the *Sheet Metal Workers* plan does not unnecessarily affect the rights of any readily ascertainable group of non-minority employees. 753 F.2d at 1187. Thus, there will be no stigmatization of non-minorities who have failed to be hired or promoted.

When affirmative action relief is designed to eliminate the effects of past discrimination, it may impinge on the settled expectations of theoretically innocent parties whether or not the affected non-minorities oppose the remedy. *Fullilove*, 448 U.S. at 484. The non-minorities need not themselves be guilty of discrimination. *Id.* at 484-85. However, it may reasonably be assumed that some or all of those adversely affected by the remedial action previously benefited from their non-minority status. *Id.* at 485. In any event, as Chief Justice Burger has stated, "[w]hen effectuat-

ing a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.*

B. The Affirmative Action Plans Are Valid Means of Enforcing the Policy and Command of the Thirteenth Amendment and the Civil Rights Statutes Promulgated Thereunder.

This Court has held that the thirteenth amendment and 42 U.S.C. §§ 1981 and 1982 create broad powers in Congress and the federal courts to remedy racial discrimination. The instant cases involve court-ordered remedies that mitigate the effects of long-standing systematic discrimination. Under its thirteenth amendment power to enforce the prohibition against slavery, Congress passed §§ 1981 and 1982 as part of the 1866 Civil Rights Act. Section 1981 prohibits racial discrimination, *inter alia*, in public employment. Section 1982 prohibits racial discrimination in the renting, leasing, and ownership of real property.

This Court recently noted that to understand the purpose and reach of these statutes, "we must be mindful of the 'events and passions of the time' in which the law[s] [were] forged." *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 386 (1982) (quoting *United States v. Price*, 383 U.S. 787, 803 (1966)). In reviewing the historical context, one commentator has noted that "[p]roponents hoped that passage of the thirteenth amendment would eliminate sectional strife and hatred." Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Houston L. Rev. 1, 11 (1974). NCBM has a similar interest in promoting racial equality and reducing racial tensions in urban areas.

This Court has consistently construed the thirteenth amendment and the 1866 Civil Rights Act as sweeping

prohibitions against racial discrimination, as well as broad grants of remedial power available to prevent or correct the effects of discrimination. The remedies available under Title VII and the Civil Rights Act of 1866 "augment each other and are not mutually exclusive." *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975) (quoting H.R. Rep. No. 238, 92nd Cong., 1st Sess. 19 (1971)); accord *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). The power to fashion effective remedies for racial discrimination under the thirteenth amendment is even broader than such power under the fourteenth amendment. *Civil Rights Cases*, 109 U.S. 3, 23 (1883); see *Clyatt v. United States*, 197 U.S. 207, 217 (1905). As declared in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968):

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20. Whether or not the amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*"

Id. at 439 (emphasis in original); accord *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

Relief should, within the law, be as drastic as necessary to redress the wrongs resulting from racial discrimination. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239 (1969).*

* See, e.g., *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287-89 (1976) (invalidating employment discrimination

(footnote continued on following page)

In view of this Court's understanding that "the existence of a statutory right implies the existence of *all* necessary and appropriate remedies," *Sullivan*, 396 U.S. at 239 (emphasis added), the Court should recognize the thirteenth amendment, and the statutes passed pursuant to its enabling power, as an independent basis supporting the affirmative action plans at issue.

C. A Municipality's Authority to Promulgate an Affirmative Action Plan in Public or Publicly-Funded Employment Is Drawn From the Tenth Amendment.

In *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), this Court held that a state's ability to determine the terms and conditions of public employment is an "undoubted attribute of state sovereignty."* That principle supplies guidance here as to municipal decisions regarding terms and conditions of public employment.

This Court has recently proclaimed that "[t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal no matter how unorthodox or unnecessary anyone else—including the judiciary—

(footnote continued from preceding page)

against whites and non-whites under § 1981); *Runyon v. McCrary*, 427 U.S. 160, 172-73 (1976) (same); *Sullivan*, 396 U.S. at 238 (invalidating restrictions on the ability of non-whites to own and convey real estate under § 1982); *Jones*, 392 U.S. at 414 n.13 (same).

* But cf. *EEOC v. Wyoming*, 460 U.S. 226, 238 n.11 (1983) ("... we are not to be understood to suggest that every state employment decision aimed simply at advancing a generalized interest in efficient management—even the efficient management of traditional state functions—should be considered to be an exercise of an 'undoubted attribute of state sovereignty.'" (emphasis added)).

deems state involvement to be."* *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005, 1015 (1985). In *Fullilove*, Chief Justice Burger, quoting Justice Brandeis, recognized the significance of this concept in upholding an affirmative action plan:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.

448 U.S. at 491 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Chief Justice Burger's quotation of Justice Jackson also bears repeating:

Each such decision [striking down legislative social experimentation and compromise] takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.

Fullilove, 448 U.S. at 490-91 (quoting R. Jackson, *The Struggle for Judicial Supremacy* 321 (1941)).

That is the essence of the NCBM's position here. Municipalities, in our federal scheme, should be free to take whatever fair and reasonable steps are necessary to combat the disabling effects caused by their histories of racial discrimination in employment.

* NCBM does not suggest, of course, that the tenth amendment could save legislation prohibited by the subsequently enacted fourteenth amendment. *Hunter v. Underwood*, 105 S. Ct. 1916, 1923 (1985).

POINT II

Municipalities Have an Affirmative Obligation Under the Fourteenth Amendment to Eradicate Lingering Vestiges of Racial Discrimination in Public and Publicly-Funded Employment.

Not only are the affirmative action plans at issue constitutionally permissible, they also may be required. The fourteenth amendment demands more from municipalities than merely ending past official discrimination; they must take affirmative steps to ensure equal opportunity in public and publicly-funded employment. This Court's rulings in the area of education are instructive in defining the duty of a state, or in this case its political subdivision, a municipality, to eliminate the effects of past discrimination in public employment.

In *Green v. County School Board*, 391 U.S. 430 (1968), this Court ruled that a school board which has historically operated a dual school system is "clearly charged with [an] affirmative duty to take whatever steps might be necessary to convert to a unitary [school] system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38 (emphasis added). Similarly, in *Swann v. Charlotte-Mecklenburg Board of Education*, this Court recognized that a local government has the duty to "eliminate from the public schools all vestiges of state-imposed segregation." 402 U.S. at 15; see *Columbus Board of Education v. Penick*, 443 U.S. 449, 458-61 (1979); *Milliken v. Bradley*, 433 U.S. 267, 281-83 (1977).

A municipality's obligation in public employment should be at least as rigorous as its responsibility in education. A primary justification for promoting equal educational opportunities is the role education plays in "preparing [children] for later professional training," *Brown v. Board of*

Education, 347 U.S. 483, 493 (1954), and "provid[ing] the basic tools by which individuals might lead economically productive lives. . . ." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). It would be a cruel irony to provide a child with a good education, yet deny him or her the opportunity to make full use of that education in a public service job.*

POINT III

Affirmative Race-Conscious Relief Is Valid Under Title VII.

A. Since a Municipality's Affirmative Obligation Under the Fourteenth Amendment Can Be Met Through an Affirmative Action Plan, and Title VII Was Extended to Cover State and Municipal Employees to Effectuate the Purposes of the Fourteenth Amendment, Such a Plan Cannot Violate Title VII.

An affirmative action plan is, in many circumstances, the most effective method for a municipality to meet its obligation under the fourteenth amendment to root out racial discrimination in public and publicly-funded employment. See *Bakke*, 438 U.S. at 362 (Brennan, White, Marshall, Blackmun, JJ.); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 46; *Brooks v. Beto*, 366 F.2d 1, 24 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967). Thirty-five years ago, Justice Frankfurter, dissenting in *Dennis v. United States*, 339 U.S. 162, 184 (1950), declared that "there is no greater inequality than the equal treatment of

* When coverage of Title VII was extended to state and local government employees in 1972, it was recognized that "[s]tate and local governments ha[d] failed to fulfill their obligation to assure equal job opportunity." S. Bill No. 2515, 92nd Cong., 2d Sess., reprinted in *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1173 (BNA 1973) (remarks of Sen. Javits) (quoting U.S. Comm'n on Civil Rights, 1969 Report on Equal Opportunity in State and Local Government at 10).

unequals." By 1971, this Court transformed the theory of Justice Frankfurter's dissent into law by holding that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Swann*, 402 U.S. at 46. Race-conscious practices have often been upheld by this Court since *Swann*.*

When Title VII was amended in 1972, Pub. L. No. 92-424, 86 Stat. 688, affirmative action was recognized by Congress as a fundamental remedial principle of Title VII. Not only did Congress reject amendments to Title VII which would have precluded the use of race-conscious remedies, 118 Cong. Rec. 4918 (1972), but both the House and Senate reports cited, with approval, judicial decisions upholding affirmative action. See S. Rep. No. 415, 92nd Cong., 1st Sess. 8 n.4 (1971); H.R. Rep. No. 238, 92nd Cong., 1st Sess. 5 n.1 (1971), reprinted in 1972 U.S. Code Cong. & Ad. News at 2141 n.1. In fact, the House report explicitly stated that "[a]ffirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforce-

* See *Fullilove*, 448 U.S. at 476-78 (upholding race-conscious statute designed to prevent perpetuation of past discrimination in allocation of government contracts to minority-owned businesses); *Bakke*, 438 U.S. at 320 (Powell, J., concurring in judgment) (permitting consideration of racial criteria in medical school admissions to compensate for effects of past discrimination); *United Jewish Orgs. v. Carey*, 430 U.S. 144, 161 (1977) (plurality opinion) (upholding race-conscious redistricting plan to eliminate effects of past electoral discrimination); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (upholding preferential hiring to eradicate effects of past discrimination in employment); cf. *Califano v. Webster*, 430 U.S. 313, 318-20 (1977) (per curiam) (upholding sex-based preference in social security to redress long standing disparate treatment of females); *Kahn v. Shevin*, 416 U.S. 351, 353-55 (1974) (upholding property tax exemption for widows, but not widowers, because spousal loss historically imposed a disproportionately heavy burden on widows).

ment of Title VII in remedying employment discrimination." *Id.* at 16, 1972 U.S. Code Cong. & Ad. News at 2151.

A municipality, therefore, can meet its positive obligation under the fourteenth amendment to eliminate the effects of past discrimination through an affirmative action plan. Title VII was extended to serve the purposes of the fourteenth amendments. See *Weber*, 443 U.S. at 203; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976). Thus, to construe Title VII as invalidating the affirmative action plans at issue would be to ignore the purposes that Title VII was designed to achieve.

B. Affirmative, Voluntary Race-Conscious Relief Is Permissible for Public Employers.

In *United Steelworkers of America v. Weber*, this Court upheld under Title VII a voluntary race-conscious affirmative action plan. Like the plans here, the plan upheld in *Weber* (1) did not require the discharge of non-minority workers and their replacement with minorities; (2) did not create an absolute bar to the advancement of non-minorities; and (3) was temporary in nature and designed to terminate when the underutilization of minorities had been corrected. 443 U.S. at 208.

In contrast to *Weber*, *Sheet Metal Workers* did not involve a voluntary affirmative action plan. While the plan is supported by the City and State of New York, among others, it was issued in response to the petitioners' repeated violations of court orders and, while reasonable under the criteria established in *Weber*, can be affirmed by looking solely to the District Court's equitable authority to enforce its own orders.*

* Federal district courts have inherent power to hold a party in civil contempt upon clear and convincing proof of noncompliance with a court order. *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir.),

A difference between the affirmative action plan approved in *Weber* and that at issue in *Vanguards* is that *Weber* involved a private employer while *Vanguards* involves a public employer. This Court, however, has recognized that when Congress extended Title VII coverage to public employees in 1972, it "expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). The Equal Employment Opportunity Commission recognized "the clear Congressional intent to encourage voluntary affirmative action." 29 C.F.R. § 1618.1 (1985).^{*} Disallowance of the public em-

(footnote continued from preceding page)

cert. denied, 454 U.S. 832 (1981). Moreover, federal district courts have broad discretion to fashion appropriate coercive remedies for noncompliance in the face of civil contempt, based on the nature of the harm and the probable effect of alternative sanctions. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947); *N.A. Sales Co. v. Chapman Industries Corp.*, 736 F.2d 854, 857 (2d Cir. 1984). It is not necessary to show that petitioners disobeyed the District Court's order willfully. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Since the purpose is remedial, the petitioners' motives in doing the prohibited act are irrelevant. *Id.*

The petitioners in *Sheet Metal Workers* were found in contempt for repeatedly failing to comply with the two affirmative action plans. The Second Circuit held that there was clear and convincing evidence showing that petitioners "had not been reasonably diligent in attempting to comply with the orders of the court and the administrator." 753 F.2d at 1182. In fact, as the Court of Appeals noted, the petitioners "virtually concede[d] the facts showing those violations," but offered no acceptable arguments to excuse their noncompliance. *Id.* at 1179-81. This Court should not countenance petitioners' contumacious conduct; the integrity of the judicial power should be upheld by affirming the order finding petitioners in contempt.

^{*} EEOC interpretations of Title VII, being those of the agency charged with enforcing the statute, are "entitled to great deference," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971)), and should be followed absent "compelling indications that [they are] wrong." *Miller v. Youakim*, 440 U.S. 125, 145 n.25 (1979) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

ployment affirmative action plan in *Vanguards* would frustrate the purposes of Title VII by discouraging the voluntary settlement of employment discrimination claims. See *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Bakke*, 438 U.S. at 364 n.8; *Alexander v. Gardner-Denver Co.*, 415 U.S. at 44. Municipalities, even more than private employers, should be able voluntarily to accomplish federal government goals. See *United Jewish Orgs. v. Carey*, 430 U.S. at 162-63. State and municipal action is particularly important in employment discrimination because Title VII reserves for states the right to enforce the Civil Rights Act through state agencies. See 42 U.S.C. § 2000e-5(b)(c) (1982); 1972 U.S. Code Cong. & Ad. News. at 2154. Indeed, the importance of state and local action in this area grows as the federal government's role diminishes. See, e.g., Pear, *Rights Chief Assails Hiring Goals as Failure*, N.Y. Times, Nov. 1, 1985, § A, at 19, col. 1 (Reagan Administration intends to dismantle affirmative action program for federal contractors).

If the plans were disallowed, public employers would be in an untenable position. On the one hand, public employers would be faced with liability to minorities for past discrimination. *Monell v. Department of Social Services*, 436 U.S. 658, 694-95, 701 (1978). On the other, public employers would confront liability to non-minorities for voluntary preferences adopted to ameliorate the effects of past discrimination against minorities. *Weber*, 443 U.S. at 209-10 (Blackmun, J., concurring); *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom. United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). The EEOC has found "that by enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute

they are seeking to implement." 29 C.F.R. § 1618.1 (1985).

C. The *Stotts* Decision Does Not Prohibit Affirmative Race-Conscious Relief.

This Court did not rewrite Title VII in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), so as to bar all affirmative action, except victim-specific relief. This Court was careful to note that the discrete issue presented in *Stotts* was the District Court's authority to override a *bona fide* seniority system to require layoffs of more senior whites, in the absence of a showing of intentional discrimination. *Id.* at 2585. *Stotts* is limited to competitive seniority cases involving *bona fide* seniority systems and does not bar all race-conscious prospective relief. *Stotts* is both factually and legally distinguishable from the cases at bar.*

First, *Stotts* did not involve a finding of intentional discrimination. In *Vanguards*, however, the District Court expressly found "a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department." 753 F.2d at 483. Similarly, in *Sheet Metal Workers*, the District Court found that the union had purposefully discriminated against nonwhites in violation of Title VII. 753 F.2d at 1186.

Second, *Stotts* concerned a court-ordered plan, which was imposed over the objections of the City of Memphis. The Court explicitly refused to decide whether the City

* A number of courts have limited *Stotts* to its facts and narrow holding. See *Deveraux v. Geary*, 765 F.2d 268, 271-75 (1st Cir. 1985); *Paradise v. Prescott*, 767 F.2d 1514, 1527 (11th Cir. 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, 105 S. Ct. 782 (1985) (*Stotts* limited to orders implicating § 703(h) of Title VII); *Van Aken v. Young*, 750 F.2d 43, 44-45 (6th Cir. 1984) (*Stotts* does not affect voluntary plans or affirmative action in which seniority is not at issue).

could have voluntarily adopted such a provision. 104 S. Ct. at 2590. There was no suggestion in *Stotts* that the Court was overruling *Weber's* endorsement of voluntary affirmative action.*

Third, in *Stotts*, this Court explicitly restricted the victim-specific limitation of section 706(g) to "make-whole" relief. 104 S. Ct. at 2589. Section 706(g) does not limit the authority of a court to award prospective, race-conscious relief designed to dismantle prior patterns of job segregation and ensure the prospective integration of an employer's workforce by enhancing future employment opportunities for minorities. The last sentence of section 706(g), which provides that a court cannot compel an employer to reinstate, hire, promote or give back pay to any individual if the employer has taken action against that individual for a non-discriminatory reason, does not address the broader issue of prospective relief.

Finally, *Stotts* was in essence a case about the scope of a District Court's power to amend a consent decree over the objections of one of the parties. 104 S. Ct. at 2594-95 (Stevens, J., concurring in the judgment). The entire discussion in *Stotts* centers on the District Court's improper award of "make-whole" relief. Unlike the injunction in

* On January 7 and 8, 1982, the District Court held an evidentiary hearing specifically to consider intervenor Local 93's objections to the 1981 proposed consent decree. At a second evidentiary hearing held on April 27, 1982, the District Court indicated that the intervenor's primary objection to the decree was its use of racial "quotas." 753 F.2d at 482. Although the proposed consent decree ultimately adopted by the District Court was not agreed to by Local 93, its objection was the same as that made at the April 1982 hearing: the use of racial goals, which it characterized as "quotas." *Id.* at 483. Local 93 has had its day in court. The issue is not whether every affected party consented to the consent decree, but rather, as was true here, whether the consent decree is constitutionally and statutorily authorized in a context where every party was heard or had an opportunity to be heard.

Stotts, which had the effect of shifting the impact of the layoffs to other identifiable individuals, the goals at issue in the two cases at bar do not have the effect of depriving any particular individual of his job or even of an employment opportunity.

An expansive interpretation of *Stotts* has no basis in the text of the opinion and would be contrary to Title VII's legislative history, which reflects an endorsement of affirmative action.

CONCLUSION

For the foregoing reasons, the National Conference of Black Mayors, as *amicus curiae*, respectfully prays that the judgments of the Second and Sixth Circuits be affirmed.

Dated: January 2, 1986

Respectfully submitted,

CONRAD K. HARPER,
Counsel of Record

ELIZABETH PRYOR JOHNSON
STEVEN L. LAPIDUS

SIMPSON THACHER & BARTLETT*
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

* Michael E. Lewitt and Debra Osofsky assisted in the preparation of this brief.

APPENDIX

APPENDIX OF RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment XIII:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

United States Constitution, Amendment XIV, Sections 1 and 5:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2. [§ 703]: Unlawful Employment Practices—Employer Practices

(a) It shall be an unlawful employment practice for an employer—

*Appendix of Relevant Constitutional
and Statutory Provisions*

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. 2000e-5(g) [§ 706(g)]:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the

*Appendix of Relevant Constitutional
and Statutory Provisions*

unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 1981: Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

AMICUS CURIAE

BRIEF

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, AND LOCAL 28 JOINT
APPRENTICESHIP COMMITTEE,

Petitioners,
v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF RESPONDENTS

JAN S. AMUNDSON
General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1776 F Street, N.W.
Washington, D.C. 20006
(202) 637-3055

DENNIS H. VAUGHN
JOHN C. FOX *
PATRICK W. SHEA
PAUL, HASTINGS, JANOFFSKY
& WALKER
1050 Connecticut Avenue, N.W.
Twelfth Floor
Washington, D.C. 20036
(202) 223-9000

PAUL GROSSMAN
PAUL, HASTINGS, JANOFFSKY
& WALKER
555 South Flower Street
Twenty-Second Floor
Los Angeles, California 90071
(213) 489-4000

*Attorneys for Amicus Curiae
The National Association of
Manufacturers*

January 24, 1986

* Counsel of Record

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1656

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, AND LOCAL 28 JOINT
APPRENTICESHIP COMMITTEE,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF AMICUS CURIAE OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF RESPONDENTS**

The National Association of Manufacturers ("NAM") respectfully submits this brief *amicus curiae* pursuant to the written consents of the parties.¹

INTEREST OF THE AMICUS CURIAE

NAM is a non-profit voluntary business association of approximately 13,000 manufacturing and related business

¹ These consents have been filed with the Clerk of the Court.

concerns. Its members employ approximately 85 percent of all workers in the nation's manufacturing sector and produce more than 80 percent of the nation's manufactured goods. As employers, NAM's members support affirmative action in the workplace as an effective method of achieving civil rights progress by enhancing employment opportunities for minorities and women. Affirmative action has proved to be a good business policy which has allowed industry to benefit from new ideas, opinions and perspectives generated by greater workforce diversity. Affirmative action has also strengthened the fabric of society by creating an environment of cooperation and understanding among persons of diverse backgrounds.

NAM believes that effective affirmative action plans include outreach, recruitment, counseling and training activities designed to ensure that qualified minorities and women are considered for employment opportunities. Goals for minority workforce participation are merely an effective measurement of program success.

This case raises the issue of whether race-conscious goals are an appropriate judicial remedy where intentional discrimination is found, and presents an indirect challenge to the use of race-conscious goals in voluntary affirmative action programs. NAM believes goals are both an effective tool in voluntary affirmative action programs and an appropriate remedy in a case where there is a finding of discrimination.

SUMMARY OF THE CASE

After making a general finding in 1975 that the petitioner union and joint apprenticeship committee had discriminated on the basis of race in denying admission to nonwhites, the trial court ordered relief, which included a 29 percent nonwhite membership goal to be achieved by July 1981. The trial court also ordered petitioners to take specific steps designed to achieve this goal, including revision of union admission procedures, restrictions on the

issuance of temporary work permits, and adoption of a publicity campaign to increase awareness among nonwhites of employment opportunities with the union. In 1982, the trial court held petitioners in contempt for failure to comply with its 1975 order. The court stated that it was *not* holding petitioners in contempt for failure to attain the 29 percent goal, but for failure to comply with other aspects of its remedial order. 29 Fair Empl. Prac. Cas. at 1146. The trial court imposed contempt sanctions and ordered petitioners to take additional remedial measures, which included a revised nonwhite membership goal of 29.23 percent to be attained by July 31, 1987 and the creation of a training fund to assist nonwhite apprentices.

On appeal, a divided panel of the court of appeals affirmed the finding of contempt and largely affirmed the remedial measures ordered by the trial court, including the revised 29.23 percent goal and the minority apprentice training fund. In affirming, the majority was careful to note that the trial judge "did not rest his contempt finding on failure to meet the 29% membership goal by the date ordered. . . ." 753 F.2d at 1176-77. In his dissent, Judge Winter disagreed, contending that petitioner union had the approval of the court-appointed administrator for every action it took and concluding therefrom that "[t]he majority's tacit premise . . . is that full compliance with the specific terms of [the trial court's order] is legally insufficient to avoid sanctions for contempt if the 29% goal is not met." *Id.* at 1189. Judge Winter, however, appeared to suggest that a race-conscious "goal guiding the administrator's decisions" would be permissible under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1982 ed.) ("Title VII") and the Constitution. *Id.*

Despite this apparent agreement among the members of the panel of the Court of Appeals, petitioners in this Court argue that any type of race-conscious relief not

limited to identified victims of discrimination is impermissible under Title VII and the Constitution, including even flexible goals which are merely guidelines. The position of the EEOC with respect to flexible goals is less clear. The EEOC argues, on the one hand, that relief under Title VII is properly limited to identified victims of discrimination, but stresses, on the other hand, the broad authority of courts to order nondiscriminatory affirmative action. See Brief for the EEOC at 30-32. The EEOC also argues that the court-ordered training fund approved by the Court of Appeals violates Section 703(d) of Title VII, 42 U.S.C. § 2000e-2(d), because the fund benefits minority apprentices exclusively. Under the EEOC's reasoning, such a fund is unlawful whether ordered by a court or adopted by an employer or union voluntarily.

SUMMARY OF ARGUMENT

It is the position of *amicus curiae* that a court-ordered race-conscious goal imposed after a general finding of discrimination, which only serves as a flexible guideline for directing an employer's or union's good faith efforts to increase minority participation in the workforce, does not contravene either Title VII or the Constitution.

With respect to the training fund issue, *amicus curiae* submits that the EEOC reads the decision of this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), too narrowly. In *Weber*, the Court held that an affirmative action program voluntarily adopted by an employer and union for a remedial purpose does not violate Title VII, provided it is temporary in duration and does not unnecessarily trammel the interests of white employees. The Court in this case should be careful not to limit or impair its holding in *Weber*, because voluntary affirmative action programs remain a necessary management tool for effecting voluntary compliance with Title

VII and because such programs have resulted in substantial employment gains for minorities and women.²

ARGUMENT

I. FLEXIBLE RACE-CONSCIOUS GOALS ARE A LAWFUL GUIDELINE FOR DIRECTING AN EMPLOYER'S OR UNION'S GOOD FAITH EFFORTS TO EXPAND CONSIDERATION OF THE AVAILABLE POOL OF QUALIFIED MINORITIES.

A. Federal Agency Distinctions Between Goals And Quotas.

Every agency of the federal government responsible for enforcing equal employment opportunity laws and regulations has recognized a principled distinction between goals and quotas.³

Beginning in 1969, the Attorney General of the United States issued an opinion on the legality of a plan which proposed to use race-conscious goals to implement Execu-

² Affirmative action issues are also raised in two other cases before the Court, *Wygant v. Jackson Board of Education*, cert. granted, 105 S.Ct. 2015 (1985), and *Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, cert. granted, 106 S.Ct. 59 (1985). *Wygant* deals exclusively with the limits the Constitution places on affirmative action by public employers. *Local No. 93* deals with the restrictions, if any, which § 706(g) of Title VII places on consent decrees. Neither of these cases requires reexamination of the lawfulness of a voluntary affirmative action program of a private employer which is not embodied in a consent decree.

³ The distinction recognized by these agencies differs from the goals/quotas distinction adopted by the court below. The court there distinguished between goals and quotas on the basis of permanence, holding that a goal is a requirement for a specified racial percentage which must be met by a specified date, but need not be maintained thereafter, while a quota is a fixed percentage requirement which must be permanently maintained. 753 F.2d at 1186. See also *Rios v. Enterprise Association of Steamfitters Local 638*, 501 F.2d 622, 628 n.3 (2d Cir. 1974).

tive Order 11246. 42 Op. Att'y Gen. 405 (1969). In finding the plan lawful, the Attorney General relied on the two essential elements which distinguish goals from quotas. First, the plan provided that the commitment to specific goals "is not intended and shall not be used to discriminate against any qualified applicant or employee." (sec. 6(b)(2))." *Id.* at 408. Second, the obligation to meet the goals was not absolute. The employer was only required to make good faith efforts to meet its commitment. *Id.*

On March 23, 1973, the Departments of Justice and Labor, the Equal Employment Opportunity Commission, and the Civil Service Commission issued a joint memorandum which further developed the distinction between goals and quotas. 2 Empl. Prac. Guide (CCH) ¶ 3775 (March 23, 1973). The memorandum defined a quota system as one that "would impose a fixed number or percentage which must be attained, or which cannot be exceeded; . . . regardless of the number of potential applicants who meet necessary qualifications." *Id.* at 2096. Under a quota system, an employer who fails to meet the fixed number or percentage is subject to sanction. *Id.*

In comparison, a goal was defined in the memorandum as a "numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market." *Id.* If the employer fails to meet the goal because he has fewer vacancies than expected or despite good faith efforts, "he is not subject to sanction, because he is not expected to displace existing employees or to hire unneeded employees to meet his goal." *Id.*⁴

⁴ This interpretation of affirmative action goals was reaffirmed by the Equal Employment Opportunity Coordinating Council in a 1976 policy statement. See 41 Fed. Reg. 38,815 (1976). The distinction has most recently been reaffirmed by Secretary of Labor Raymond J. Donovan sitting in his capacity as the administrative appeal officer of last resort in cases prosecuted by the U.S. Department of

Thus, every federal agency responsible for enforcing equal employment opportunity has recognized and currently recognizes a distinction between goals and quotas. As so defined, NAM supports the use of flexible goals after a finding of discrimination as an appropriate remedy which contravenes neither the remedial limits of Title VII nor the Constitution. NAM has no position on whether quotas may be used as a remedy in cases such as this where a union or employer has been held in contempt for violation of a court's order.⁵

B. Court-Ordered Race-Conscious Goals Are An Appropriate Remedy Authorized by Title VII.⁶

Petitioners contend that section 706(g) of Title VII prohibits a court from ordering the hiring, promotion, reinstatement or payment of back pay to individuals who are not identified victims of discrimination.

Even if petitioners were to prevail on this point, goals do not transgress this limitation. Goals are established in

Labor pursuant to its authority under Executive Order 11246. See *Office of Federal Contract Compliance Programs ("OFCCP") v. Priester Construction Co.*, No. 78-OFCCP-11 (Feb. 22, 1983), summarized in 2 Aff. Action Compl. Man. (BNA) D: 9121 (goals, unlike quotas, merely require good faith efforts and do not require that one person be preferred over another because of his or her race or sex); *OFCCP v. National Bank of Commerce of San Antonio*, No. 77-OFCCP-2 (Dec. 11, 1984), summarized in *OFCCP Fed. Contract Compl. Man. (CCH)* ¶ 21,223 (same).

⁵ The court of appeals divided on whether petitioners were sanctioned solely because they failed to meet the 29 percent "goal" or because they failed to make good faith efforts to meet the goal by complying with other aspects of the trial court's 1975 order. Given the apparent ambiguity of the record on this point, *amicus curiae* takes no position on whether the 29 percent "goal" in this case is actually a goal or a quota.

⁶ While this case presents issues related to race-conscious relief, similar principles will apply to all types of relief under Title VII, including, for example, gender-conscious remedies.

conjunction with other types of prospective remedies designed to expand the available pool of qualified minority (and female) applicants. Such prospective remedies might include use of "outreach" efforts known as "linkage programs" to connect employers with available pools of minorities trained or experienced for available positions. Other available prospective remedies may involve recruitment or advertisement efforts to increase the applicant flow of qualified minorities. Such outreach and recruitment efforts are inclusionary and not exclusionary and assist employers by expanding the pool of identifiable qualified candidates for hire and promotion. If an employer or union makes good faith efforts to achieve a goal by making these sorts of outreach and recruitment efforts, it is not subject to sanctions if, despite such efforts, a goal is not met. In this context, goals are used only as a guideline to measure progress achieved through other remedial measures and to determine when such efforts may no longer be useful or necessary.

With this limitation, race-conscious goals do not run afoul of any possible interpretation of Section 706(g), because they do not require employers to hire, promote or reinstate nonvictims of discrimination. They require only equal consideration of qualified candidates, minority and otherwise, within the available pool. Thus, goals measure progress achieved through other remedial measures, such as affirmative advertising and recruitment efforts, which are consistent with any limits imposed by Section 706(g) and which this Court has expressly approved in the past. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 n.47, 366 n.51 (1977); Brief for the EEOC at 30-32.⁷

⁷ Of course, any relief ordered by a federal court may only be predicated on a finding of a violation of Title VII and must be carefully tailored to fit the nature and extent of the violation found. *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976).

C. Under The Constitution, Race-Conscious Goals Are A Permissible Remedy After A Finding of Discrimination.

Members of the Court have proposed a number of different standards for determining the constitutionality of government sponsored race-conscious remedial action. *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980) (opinion of Burger, C.J.) (analysis of race-conscious remedial classification requires close examination of objectives of the classification and the means for achieving these objectives); *id.* at 496 (Powell, J., concurring) (racial classification must be necessary means of advancing a compelling governmental interest); *id.* at 519 (Marshall, J. concurring in the judgment) (racial classifications designed to further a remedial purpose must serve important governmental objectives and be substantially related to achievement of those objectives).

Each of these tests emphasizes a number of common points with respect to race-conscious remedies. First, race-conscious remedies must be flexible. Thus, the Court in *Fullilove* upheld a race-conscious minority business set-aside program because "[t]he MBE program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity." *Id.* at 473 (opinion of Burger, C.J.). Instead, a provision for waiver of the program's ten percent set-aside requirement in cases where this goal was impossible to attain through good faith efforts provided the necessary flexibility to pass constitutional muster. *Id.* at 488 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring). See also *Regents of the University of California v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.) (race may flexibly be considered as a plus in seeking diverse student body, but a fixed number of slots in a class may not be reserved for minority students).

Second, remedial racial classifications also may not unduly or unnecessarily interfere with the rights or expect-

tations of innocent third parties. *Fullilove v. Klutznick*, 448 U.S. at 514 (Powell, J., concurring). However, in remedying the effects of past discrimination, some "sharing of the burden" by innocent parties is permissible. *Id.* at 484 (opinion of Burger, C.J.). Finally, remedial racial classifications are constitutionally defective where they have the effect of stigmatizing a particular class of persons. *Regents of the University of California v. Bakke*, 438 U.S. at 360 (opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ.); *id.* at 298 (opinion of Powell, J.).

Reliance on properly limited goals is a narrowly tailored means to remedy discrimination which comports fully with constitutional limitations. Goals are flexible; they do not automatically require sanction of an employer or union which, despite good faith efforts, fails to attain the goal. Goals also permit employers or unions to consider applicants on an individual basis and do not require that one person be preferred over another because of his or her race. This both reduces interference with the settled expectations of innocent third parties and minimizes any stigma arising out of the use of goals. Thus considered in light of established constitutional principles race-conscious goals are a permissible, narrowly tailored means of achieving the legitimate objective of remedying past discrimination.

II. THE COURT NEED NOT AND SHOULD NOT LIMIT OR IMPAIR ITS HOLDING IN *WEBER* THAT GIVES EMPLOYERS SUBSTANTIAL LATITUDE IN ADOPTING REMEDIAL, VOLUNTARY AFFIRMATIVE ACTION PROGRAMS.

In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), this Court held that voluntary affirmative action programs do not violate Title VII, provided they are temporary in duration and do not unnecessarily trammel the interests of white employees. Unlike *Weber*,

this case concerns the limits which § 706(g) and the Constitution place on a court's authority to order relief after a finding of discrimination. Voluntary affirmative action programs adopted by private employers are subject neither to the restrictions of § 706(g) nor to the constitutional limitations of the equal protection and due process clauses. This case, therefore, would appear to offer no occasion to reexamine this Court's holding in *Weber*.

The EEOC, however, attacks the trial court's creation of a fund to assist minority apprentices with their training as being inconsistent not only with the remedial limits of § 706(g), but also as violative of § 703(d), which prohibits racial discrimination in apprenticeship programs. Brief for the EEOC at 37. The argument of the EEOC based on § 703(d) thereby suggests that it would be unlawful for an employer to create a training fund to aid minority employees, either at the direction of a court or as a purely voluntary aspect of its affirmative action program.

The position of the EEOC appears contrary to this Court's decision in *Weber*. The EEOC claims that *Weber* is distinguishable because the training program at issue there provided that whites and nonwhites would be admitted on a one-to-one basis. By contrast, the training fund in this case was established exclusively for the benefit of nonwhites. Thus, the EEOC contends that this is a 100 percent quota which far exceeds the 50 percent admission ratio approved in *Weber*.

The EEOC, however, defines the program at issue here too narrowly by focusing exclusively on the training fund. The fund is only one component of an overall apprenticeship program which admits both whites and nonwhites in approximately equal numbers, as was true of the apprenticeship training program this Court ap-

proved in *Weber*.⁸ The fund merely provides limited financial assistance to nonwhites who might otherwise experience difficulty in remaining in the apprenticeship program, "the route they most frequently travel in seeking union membership" (A-26). Thus, the fund considered as part of the training program as a whole does not "unnecessarily trammel the interests of white employees," who retain a full opportunity to be selected for and to participate in the apprenticeship program.⁹

This Court should be careful not to limit or impair its holding in *Weber*. In reliance on *Weber*, a substantial number of private employers have adopted or decided to retain various types of voluntary affirmative action programs. Such programs are a reasonable response to situations where an employer finds that minorities or women are significantly underrepresented in their workforce. Given such underrepresentation, employers face a real threat of being sued based either on allegations that the employer has engaged in a pattern or practice of discrimination or that its selection procedures have had an impermissible disparate impact on minorities or women. The defense of such lawsuits is complex, and given the difficulties of rebutting a *prima facie* case or of validating selection procedures as job-related, even an employer who has acted with utmost good faith may face a serious threat of potential liability.

Voluntary affirmative action programs adopted pursuant to *Weber* offer employers a reasonable way to reduce the threat of being sued based on statistical dis-

⁸ In the instant case, recent apprenticeship classes have been 55 percent white. 753 F.2d at 1189.

⁹ Indeed, the court of appeals struck down as an abuse of discretion a one-to-one admission ratio ordered by the trial court in connection with the apprenticeship program, which would have been far more restrictive of the interests of white employees, but which would clearly have been permissible in a voluntary context under *Weber*.

parities in their workforce. As Justice Blackmun observed, if such programs were unlawful, employers would find themselves on a:

'high tightrope without a net beneath them.' . . . If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

United Steelworkers of America v. Weber, 443 U.S. at 209-10 (Blackmun, J., concurring) (quoting Wisdom, J., dissenting, 563 F.2d at 230). Permitting voluntary affirmative action programs allows employers to avoid the "high tightrope," and is fully consistent with the well-established principle under Title VII (and Executive Order 11246) that voluntary compliance is the preferred means of eliminating employment discrimination. See, e.g., *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); see also *United Steelworkers of America v. Weber*, 443 U.S. at 204 (Title VII intended as a catalyst to cause employers and unions to self-examine and self-evaluate their employment practices to eliminate vestiges of past discrimination).

In addition to providing employers with a flexible means of affecting voluntary compliance with Title VII, the use of employment goals has been a valuable tool to promote equal employment opportunities for minorities and women. Studies have indicated that affirmative action goals do affect employment patterns. One report submitted to the Department of Labor was an empirical study of the impact of the federal affirmative action regulations and antidiscrimination law on employment.¹⁰

¹⁰ See Jonathan S. Leonard, "The Impact of Affirmative Action," National Bureau of Economic Research, Cambridge, Massachusetts, and Institute of Industrial Relations and School of Business Admin-

The study concluded that affirmative action goals "have a measurable and significant impact in improving the employment of minorities and females." Impact Report at 377. Similarly, a study conducted by the Office of Federal Contract Compliance Programs within the United States Department of Labor found that employment opportunities for minorities and women were greater with federal government contractors that used employment goals pursuant to their federal affirmative action obligations under Executive Order 11246 than those available with noncontractor companies subject only to Title VII and not the Executive Order.¹¹

istration, University of California at Berkeley (July 1983) (hereinafter referred to as "Impact Report"). (A copy of the Impact Report has been lodged with the Clerk of the Court for the convenience of the Court.)

¹¹ See "Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980: A Report of the Office of Federal Contract Compliance Programs," Employment Standards Administration, U.S. Department of Labor at 37 (June 1984) (hereinafter referred to as "OFCCP Report"). (A copy of the OFCCP Report has been lodged with the Clerk of the Court for the convenience of the Court.) This study found that minority participation rates in contractors' workforces grew by 20.1 percent from 1974 to 1980, while minority employment in noncontractors' workforces grew only by 12.3 percent. OFCCP Report at 39. Women's participation rates in contractors' workforces increased by 15.2 percent, as opposed to 2.2 percent in noncontractors' workforces. *Id.*

CONCLUSION

This Court should uphold the use of race-conscious goals as a proper remedy after a finding of discrimination. This Court should also take care not to limit or impair its holding in *Weber* which preserves the flexibility needed by employers to comply voluntarily with Title VII, while promoting employment opportunities for minorities and women.

Respectfully submitted,

JAN S. AMUNDSON
General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1776 F Street, N.W.
Washington, D.C. 20006
(202) 637-3055

DENNIS H. VAUGHN
JOHN C. FOX *
PATRICK W. SHEA
PAUL, HASTINGS, JANOFSKY
& WALKER
1050 Connecticut Avenue, N.W.
Twelfth Floor
Washington, D.C. 20036
(202) 223-9000

PAUL GROSSMAN
PAUL, HASTINGS, JANOFSKY
& WALKER
555 South Flower Street
Twenty-Second Floor
Los Angeles, California 90071
(213) 489-4000

*Attorneys for Amicus Curiae
The National Association of
Manufacturers*

January 24, 1986

* Counsel of Record

AMICUS CURIAE

BRIEF

No. 84-1656

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION and LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,
v. *Petitioners,*

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
THOMAS R. BAGBY, P.C.*
McGUINNESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

*Attorneys for Amicus Curiae
Equal Employment
Advisory Council*

* Counsel of Record

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No. 84-1656

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION and LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,
v. *Petitioners,*
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae, pursuant to the written consents of the parties.¹

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and

¹ Their consents have been filed with the Clerk of the Court.

the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. In addition, nearly all of EEAC's members are subject to the affirmative action requirements under Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978). Finally, many of EEAC's members are signatories to collective bargaining agreements, Title VII settlements, conciliation agreements, consent decrees and other voluntary plans or programs which provide varying forms of remedial relief or affirmative action benefiting persons or groups covered by Title VII and other federal and state equal employment statutes, regulations and orders.

Most of EEAC's member representatives are charged with corporate responsibility for compliance with federal, state and local nondiscrimination laws. As equal employment officers, they must attempt to determine not only their companies' nondiscrimina-

tion and affirmative action obligations, but also the nature and extent of any remedial relief which may be necessary as well as the potential liability which these obligations might create to nonminority employees and applicants.

EEAC has participated in numerous other cases involving issues relating to the nature and scope of the equal employment and affirmative action obligations of employers. See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 103 S. Ct. 2076 (1983); *Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT

EEAC takes no position on the merits of this particular case. EEAC is aware, however, that this case and *Local Number 93 v. City of Cleveland*, Supreme Court No. 84-1999, are being briefed and argued in tandem. The purpose of this filing is merely to advise the Court that EEAC's views on the appropriate scope of relief that is available (after trials on the merits and in consent decrees) under Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), and under this Court's decisions in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984), and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), are fully set forth in its amicus curiae brief

filed in *Local Number 93 v. City of Cleveland*, Supreme Court No. 84-1999. EFAC accordingly is serving a courtesy copy of its brief in No. 84-1999 on all parties in this case.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
THOMAS R. BAGBY, P.C.*
McGUINNESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae
Equal Employment
Advisory Council

* Counsel of Record

January 24, 1986

AMICUS CURIAE

BRIEF

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IN THE

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OCTOBER TERM, 1985

LOCAL 28, SHEET METAL WORKERS, ETC., *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC., AMERICAN JEWISH
CONGRESS, AMERICAN JEWISH COMMITTEE, NATIONAL
ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE, MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., NATIONAL URBAN LEAGUE,
INC., PUERTO RICAN LEGAL DEFENSE AND EDUCATION
FUND, INC., ASIAN AMERICAN LEGAL DEFENSE AND
EDUCATION FUND, INC., THE NEW JEWISH AGENDA,
AND THE COMMISSION ON SOCIAL ACTION OF THE
UNION OF AMERICAN HEBREW CONGREGATIONS AND
THE CENTRAL CONFERENCE OF AMERICAN RABBIS**

JULIUS L. CHAMBERS

RONALD L. ELLIS

CLYDE E. MURPHY

PENDA D. HAIR

ERIC SCHNAPPER*

NAACP Legal Defense and
Educational Fund, Inc.

16th Floor

99 Hudson Street

New York, New York 10013

(212) 219-1900

Counsel for Amici

*Counsel of Record

(A complete list of counsel appears on p. ii)

QUESTIONS PRESENTED

- (1) Does Title VII forbid the use of race conscious numerical remedies in a case where they are necessary to redress, prevent or deter racial discrimination?
- (2) Was the race conscious numerical remedy in this case reasonably framed to prevent a continuation of proven intentional discrimination?

List of Counsel

Samuel Rabinove
Richard T. Foltin
American Jewish Committee
165 E. 56th Street
New York, New York 10002

Theodore R. Mann
Marvin E. Frankel
American Jewish Congress
15 E. 84th Street
New York, New York 10028

Grover G. Hankins
National Association for
the Advancement of Colored People
186 Remsen Street
Brooklyn, New York 11201

Antonia Hernandez
Theresa Fay Bustillos
Richard P. Fajardo
Mexican American Legal Defense
and Educational Fund, Inc.
634 S. Spring Street
11th Floor
Los Angeles, California 90014

Linda Flores
Kenneth Kimerling
Puerto Rican Legal Defense
and Education Fund, Inc.
99 Hudson Street
New York, New York 10013

Margaret Fung
Asian American Legal Defense
and Education Fund
99 Hudson Street
New York, New York 10013

David Saperstein
Commission on Social Action of the
Union of American Hebrew
Congregations and the Central
Conference of American Rabbis
2027 Massachusetts Ave., N.W.
Washington, D.C. 20036

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Section 706(g), Title VII ...	19, 21, 22, 27, 30, 33-35, 44
Section 10(c), National Labor Relations Act	27
H.R. Rep. 1370, 87th Cong., 2d Sess.	24
H.R. Rep. 914, 88th Cong., 1st Sess.	24, 26, 39
110 Cong. Rec. (1964)	26, 27, 39-46
Executive Order 11246	25

INTEREST OF AMICI*

The framing of this brief has required amici, as the resolution of this case will require this Court, to consider with care the circumstances in which numerical remedies are necessary to prevent, redress or deter violations of Title VII, and to distinguish such situations from numerical remedies which serve no such purposes and which a number of amici regard as objectionable for that and other reasons. All of the amici support vigorous enforcement of Title VII, and believe that Title VII should not be construed in a way that would leave employment discrimination on the basis of race, sex, religion or national origin

* Letters from the parties consenting to the filing of this brief have been filed with the Clerk.

unremedied, undeterred, or unpreventable. We recognize that the enforcement of Title VII has involved a variety of practical problems, and believe that here, as in other areas of the law, the views of trial courts regarding the necessary remedial measures are entitled to substantial weight.

Several of the amici have long opposed, and continue to reject, inflexible numerical devices whose purpose is to allocate jobs or other benefits on the assumption that minorities or women are inherently entitled to a particular share. But these amici object, as well, to the attempt of the Solicitor General to label as "quotas" any and all affirmative numerical remedies, regardless of whether those remedies may be essential to eliminate and correct discrimination on the basis of race, sex, religion or

national origin. The government's approach would pervert legitimate concerns about the use of unneeded numerical remedies into a major rigid rule that would at times permit continued discrimination against minorities and women.

The amici who join in this brief adhere to distinct approaches to the use of race or sex conscious numerical measures. We share, however, a common position, set out below, with regard to the specific case now before the Court. We express no joint view with regard to legal and factual issues which are not necessary for the disposition of this case.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist Blacks to secure their constitutional and civil rights by means of litigation. Since 1965 the Fund's attorneys have represented

plaintiffs in several hundred employment discrimination actions under Title VII and the Fourteenth Amendment, including many of the employment discrimination cases decided by this Court. In attempting to frame remedies to redress, prevent and deter discrimination, we have repeatedly found, as have the courts hearing those cases, that race conscious numerical remedies are for a variety of pragmatic reasons a practical necessity. In some instances, as in Sheet Metal Workers v. EEOC, numerical remedies are essential to ending ongoing intentional discrimination. In other circumstances, such as Firefighters v. Cleveland, such remedies are a practical necessity in resolving by settlement disputes as to the identities of direct or indirect victims of discrimination. We believe that effective enforcement of Title VII would at times be

impossible unless numerical orders remain among the arsenal of remedial devices available to the federal courts.

The American Jewish Committee is a national organization of approximately 50,000 members. AJC was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It is AJC's conviction that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, creed or national origin, including, specifically, elimination of discrimination in employment and educational opportunities for all Americans. Experience has demonstrated that the legal requirement of non-discrimination is by itself not sufficient to erase, within the foreseeable future, the accumulated

burdens imposed on the disadvantaged in America who have historically suffered from systematic discrimination. AJC believes that affirmative action programs -- voluntary and, in certain instances, compelled programs to recruit, train and upgrade those who have been historically disadvantaged or the victims of discrimination -- are in accord with the American tradition of giving special assistance to categories of people on whom society has imposed hardship and injustice or who have special needs that could not otherwise be met.

Accordingly, AJC is committed to specific numerical goals and timetables, even while maintaining that quotas are not an appropriate remedy and, in fact, are in violation of constitutional and statutory provisions. AJC believes that quotas, as a rigid prescribed distribution of benefits

and opportunities, are qualitatively different from other forms of race-conscious relief because they sacrifice fundamental principles of equality, fairness and individual rights. Quotas, in AJC's view, downgrade individual merit, set one group against another, and cannot be reconciled with genuine equal opportunity for all. As opposed to a quota, however, a specific numerical goal is a realistic objective arrived at not only by reference to the proportional representation of a minority group in the general population, but also by reference to the number of vacancies expected and the number of qualified or qualifiable applicants available in the relevant job market. Moreover, goals are flexible, can be adjusted if unrealistic and require only a good faith effort by employers to obtain an appropriate representation of

qualified or qualifiable members of minority groups. AJC believes that the court of appeals correctly rejected petitioners' "attempt to characterize the membership goals as a permanent quota, because the provision at issue is clearly not a quota but a permissible goal." 753 F.2d at 1186. The remedy imposed below embodies the flexibility that is characteristic of reasonable goals and timetables, in contrast to rigid quotas. All that is needed here is the vital element which was absent heretofore, i.e., a good faith effort to meet goals and timetables. If that good faith effort were convincingly demonstrated, and were petitioners still not able to meet the 29% goal, although coming reasonably close to it, this amicus maintains that the

order of the court below, properly understood, should be considered satisfied.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs which would increase opportunities for disadvantaged minorities to speed the day when all Americans may enjoy full equality without regard to race.

The National Association for the Advancement of Colored People ("NAACP") is a New York non-profit membership corpo-

ration. Its principal aims and objectives may best be understood by reference to its Articles of Incorporation:

... voluntarily to prompt equality of rights and eradicate caste or race prejudice among the citizens of the United States; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.

To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon; together with any and all things which may lawfully be done by a membership corporation....

The NAACP has a long-standing history of participating in the United States Supreme Court, both as a party and as amicus curiae, in cases presenting constitutional and statutory claims of racial discrimination. The NAACP is vitally concerned with the issues raised in this appeal.

The Mexican American Legal Defense and Educational Fund, Inc. ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure the civil rights of Hispanics living in the United States, through litigation and education. MALDEF believes that Title VII should and must apply with equal force to members of all racial and ethnic groups. MALDEF also believes, however, that public and private employers are permitted under Title VII to take reasonable voluntary measures, such as goals and timetables, to correct historical underrepresentation of racial and ethnic minorities in the workforce. In support of these principles and goals, MALDEF has participated as amicus curiae and as counsel of record in numerous cases before the Court. Wygant v. Jackson Board of Education, No. 84-1340 (MALDEF Amicus

Curiae); Firefighters Local Union NO. 1784 v. Stotts, ___ U.S. ___, 104 S.Ct. 2576 (1984).

The National Urban League, Incorporated, is a charitable and educational organization organized as a not-for-profit corporation under the laws of the State of New York. For more than 75 years, the League and its predecessors have addressed themselves to the problems of disadvantaged minorities in the United States by improving the working conditions of blacks and other minorities, and by fostering better race relations and increasing understanding among all persons.

Puerto Rican Legal defense and Education Fund, Inc. ("PRLDEF") is a New York not-for-profit corporation, authorized to practice law by the State of New York. The PRLDEF's primary purpose is to protect and advance the constitutional and

civil rights of Puerto Ricans and other Hispanics. In furtherance of this purpose, the PRLDEF represents both individuals and classes of persons who challenge employment discrimination against Puerto Ricans and other Hispanics. The PRLDEF has also filed numerous briefs as amicus curiae in employment discrimination litigation. During its thirteen year history, much of the PRLDEF's litigation, in federal and state courts, has centered on Title VII litigation.

The Asian American legal Defense and Education Fund ("AALDEF") is a non-profit civil rights organization that employs legal and educational methods to address critical issues affecting Asian Americans. AALDEF's legal and educational work against racial discrimination in the job market resulted from the historic exclusion of Asians from the mainstream of

American business life and the legacy of overt economic discrimination sanctioned by law.

New Jewish Agenda is a national non-profit, membership organization that seeks to promote traditional, progressive Jewish religious and secular values of peace and social and economic justice and the Talmudic principle of "Tikkun Olam," the just reordering of the universe. Consistent with these beliefs, NJA supports minimum quotas as a necessary mechanism for achieving true equality of opportunity and for overcoming a history of discriminatory practices in certain circumstances including, but not limited to, the factual situation in this case.

The Commission on Social Action of the Union of American Hebrew Congregations and the Central Conference of American Rabbis represents over 1 million Jews in

the United States and Canada. The Commission has long been committed to the furtherance of civil rights and civil liberties for all Americans.

SUMMARY OF ARGUMENT

I. Title VII permits a court to order numerical remedies when such remedies are needed to redress, prevent or deter discrimination. In authorizing courts to direct "affirmative relief", Congress "armed the courts with full equitable powers". Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

The legislative history of Title VII does not reveal any congressional intent to bar numerical remedies in every case, regardless of whether it might be impossible without such remedies to redress, prevent or deter discrimination in some instances. Although Title VII supporters on several occasions stated the act did

not impose "quotas", it is clear that what both supporters and opponents were concerned about was whether Title VII itself created a duty to maintain a "racially balanced" work force. United Steelworkers v. Weber, 443 U.S.193,205 (majority opinion), 235-47 (Rehnquist, J., dissenting)(1979). The specific congressional statements relied on by the Solicitor General were expressly intended as denials that Title VII required "quotas for racial balance", not as a discussion of the availability of numerical remedies to redress, prevent or deter unlawful discrimination. Section 703(j), which forbids imposition of preferential treatment for "racial balance", spells out precisely the meaning of congressional statements that Title VII did not require "quotas".

II. The petitioners in this case has a 20 year history of intransigent and successful violation of state and federal injunctions against discrimination. When specific discriminatory practices were forbidden, petitioners repeatedly devised new discriminatory schemes. The district court properly concluded that it was not feasible to foresee and forbid every conceivable device which petitioner might in the future utilize to violate the law, and that the ordering of a numerical remedy was essential to bring an end to continued discrimination.

ARGUMENT

- I. TITLE VII DOES NOT FORBID THE USE OF NUMERICAL REMEDIES NECESSARY TO REDRESS, PREVENT OR DETER DISCRIMINATION

For almost twenty years federal district judges responsible for framing decrees to enforce Title VII have con-

cluded that the use of numerical remedies was necessary to redress, prevent or deter discrimination under the circumstances of the specific cases before¹ them. As occurs in all areas of the law, the fashioning of these remedies has been an essentially practical task, reflecting the particular types of violations that had occurred or seemed likely to recur. Numerical orders have generally been regarded as the remedy of last resort, often used only when milder remedies had failed, at times accompanied by candid expressions of reluctance by the courts. The pragmatic foundation of this practice is underscored by the fact that no

¹ A description of the types of cases in which such remedies have been found necessary is set forth in part IA of the Brief Amicus Curiae of the NAACP Legal Defense Fund, et al., in Local 93, Firefighters v. Cleveland, No. 84-1999.

appellate court has ever imposed a numerical remedy where the district court concluded such remedies were unneeded.

The interpretation which petitioners and the Solicitor ask the Court to read into Title VII is thus one of enormous practical importance. For two decades judges across the nation have found in a variety of circumstances that numerical remedies were "the only possible means to provide relief for [unlawful] discrimination."² To hold, as petitioners urge, that Title VII absolutely forbids such remedies, would raise serious questions about the enforceability of Title VII itself.

Petitioners insist that this critical issue was summarily resolved by two paragraphs in Firefighters v. Stotts, dis-

² Crockett v. Green, 388 F. Supp. 912, 921 (E.D. Wis. 1975).

cussing "the policy behind § 706(g) of Title VII." 81 L.Ed.2d 483, 499 (1984). The decision in Stotts did not, however, suggest that any provision in Title VII forbade the use of any category of judicial decree that might in fact be necessary in some instances to promptly redress, prevent or deter violations of Title VII itself. Nor did Stotts attempt to delineate what types of orders were being referred to by members of Congress who expressed objections to what they called "quotas." For these reasons we believe Stotts is not dispositive of this appeal. If, as petitioners urge, courts are forbidden to use any numerical remedy in any Title VII case, regardless of whether that remedy may be essential to redress, prevent or deter discrimination,

that limitation must be found in the language or legislative history of Title VII itself.

A. Judicial Authority to Direct
"Affirmative Action"

When Congress adopted Title VII it mandated that enforcement of that law be given the "highest priority." Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Where a violation of the law has been established, section 706(g) authorizes a court, not merely to forbid future illegality, but also to "order such affirmative action as may be appropriate ... or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), correctly characterized section 706(g) as "arm[ing] the courts with full equitable powers." 422 U.S. at 418. In exercising those powers,

Albemarle recognized, the courts are to be required to do whatever may be necessary to promptly redress, prevent and deter discrimination; there may be practical obstacles to such thorough enforcement, but Title VII itself contains no such encumbrances:

[I]t is the historic purpose of equity to "secur[e] complete justice" ... "Where federally protected rights have been invaded, the ... courts will be alert to adjust their remedies so as to grant the necessary relief" ... Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as is possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

422 U.S. at 418. (Emphasis added)
"Congress' purpose in vesting a variety of 'discretionary' powers in the courts was ... to make possible the fashion[ing] [of] the most complete relief possible." 420 U.S. at 421 (Emphasis added).

This congressional intent to provide federal courts with a full arsenal of enforcement techniques led this Court in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), to reject an argument that Title VII stripped the courts of any authority to order rightful place seniority. Although there was some dispute regarding when such relief was appropriate, every member of the Court agreed that Title VII did not contain "a bar, in every case, to the award of retroactive seniority relief." 424 U.S. at 781-82 (Powell, J., concurring and dissenting). Franks emphasized that the "broad equitable discretion" established by Title VII, 424 U.S. at 763, was to be exercised in a pragmatic manner.

In equity, as nowhere else, courts ... look to the practical realities and necessities...." [A]ttainment of a great national policy ... must not

be confined within narrow canons ... suitable ... in ordinary private controversies."

424 U.S. at 777-78 and n.39.

Congress' decision to confer on federal courts such broad enforcement authority, unrestricted by any per se limitations, is readily understandable. When Congress framed Title VII in 1964, it was all too aware of the failure of earlier prohibitions against discrimination. The House Report expressly noted that discrimination had not been ended by state antidiscrimination legislation.³ Proponents of the legislation noted continuing discriminatory practices by

³ H.R. Rep. 914, 88th Cong., 1st Sess., reprinted in Legislative History of Titles VII and XI of Civil Rights Act of 1964, 1018, 2149-50 ("Legislative History"); H.R. Rep. 1370, 87th Cong., 2d Sess., Legislative History 2159; 110 Cong. Rec. 7217 (remarks of Sen. Clark).

⁴ unions, despite decisions of this Court that such discrimination violated a union's duty of fair representation.⁵ Executive Order 11246, earlier versions of which dated from 1941, had had little visible impact, although applicable to large portions of American industry.

In light of the failure of other remedies, Congress understandably refused to place any restrictions on the enforcement authority of federal judges. That decision was doubtless reinforced by the extraordinary and well publicized difficulties then being encountered by federal judges in enforcing other civil rights of racial minorities. In 1957 and 1960 Congress had adopted legislation

⁴ Legislative History, p. 2158.

⁵ Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944).

intended to eliminate racial discrimination in voting; in 1964, however, Congress recognized that discriminatory election officials remained intransigent, and that "present procedures do not provide adequate remedies".⁶ Cf. South Carolina v. Katzenbach, 383 U.S. 301, 311-13 (1966). The debates on the 1964 Civil Rights Act were also replete with references to the obstinate refusal of school officials, some 10 years after Brown v. Board of Education, 347 U.S. 483 (1954), to even begin to comply with their constitutional

⁶ 110 Cong. Rec. 6529-30 (Sen. Humphrey); see also *id.* at 1593 (Rep. Farbstein) (remedies in 1957 and 1960 civil rights acts inadequate), 1535 (Rep. Celler) (same), 144690 (Bipartisan Newsletter) (same); H.R. Rep. No. 914, 88th Cong., 1st Sess., Legislative History, pp. 2019, 2123-25.

obligation to end de jure segregation.⁷ Cf. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 13 (1971). In framing Title VII, Congress had good reason to fear that this legislation would be met by the same intransigence and evasion that for a century had frustrated enforcement of the Fourteenth and Fifteenth Amendments. Against that background the sweeping authority granted to the courts by section 706(g) is entirely understandable.

Section 706(g) was modeled after, although somewhat broader than, section 10(c) of the National Labor Relations Act. Franks v. Bowman Transportation Co., 424 U.S. at 768-770 and n.29. An order of the NLRB, this Court has repeatedly held, is

⁷ 110 Cong. Rec. 1518 (Rep. Celler), 1600 (Rep. Daniels), 6539-42 (Sen. Humphrey); H.R. Rep. No. 914, pt. 2, Legislative History, pp. 2138-42.

to be upheld "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 357 (1952); Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943). In fashioning remedial orders the Board is to be guided, not by any per se rules in the NLRA, but by "enlightenment gained from experience." NLRB v. Seven-Up Bottling Co., 344 U.S. at 347. The Court emphasized that the Board's authority to provide affirmative relief was a mandate to develop whatever remedies experience might demonstrate were needed:

[I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these diffi-

culties by leaving the adaptation of means to [that] end to the empiric process of administration.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). In fashioning specific remedies the Board was not required to act with surgical precision, but was permitted to paint with a broad brush "to attain just results in . . . complicated situations . . . through flexible procedural devices." Id. at 198-99. Enforcement orders under the NLRA were never limited to "make whole" redress, but included as well orders intended to prevent or deter future violations.⁸

⁸ See, e.g., Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941) (order to "neutralize" the effects of past violations); Virginia Power & Electric Co. v. NLRB, 319 U.S. 533, 543 (1943) (order to "deprive an employer of advantages accruing from" a violation); NLRB v. United Mine Workers, 355 U.S. 453, 456 (1958) (order to dissipate discriminatory "atmosphere" created by past violation); International Association of Machinists v. NLRB, 311 U.S. 72, 82 (1940) (order to expunge the effects

In modeling section 706(g) after the NLRA, Congress thus chose to reject precisely the sort of constricted view of remedies which petitioners now advance. The NLRB enjoyed, and Congress elected to give to the courts in Title VII cases, broad authority to take whatever steps experience might show were necessary to promptly redress, prevent or deter violations of the law. Enacted as it was in light of the established interpretation of the NLRA, section 706(g) must be understood as a mandate to the courts to develop whatever remedial devices might prove necessary and efficacious. Section 706(g), like the NLRA, does not require that remedies be framed with the precision appropriate for ordinary tort or contract litigation, particularly where such a

of past discrimination).

requirement would have the effect of impeding or delaying redress for or prevention or deterrence of violations of the vital national policies that Title VII, as well as the National Labor Relations Act, embodies.

B. The Language of Sections 703(j) and 706(g)

Local 28 argues that the asserted limitation on Title VII remedies is found in section 703(j). That provision states:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in,

any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area.

In United Steelworkers v. Weber, 443 U.S. 193 (1979), this Court rejected petitioner's interpretation of section 703(j), holding that "[s]ection 703(j) speaks to substantive liability under Title VII, but ... not .. [r]emedies for substantive violations." 443 U.S. at 205 n.5.

The carefully drafted language of section 703(j) does not support the sweeping limitation on Title VII remedies urged by petitioners. Local 28 argues that section 703(j) precludes the use of race conscious measures for any purpose, even for redressing, preventing or deterring violations of Title VII. But

section 703(j) disavows mandatory race conscious measures only under one specific circumstance, where those measures are imposed to redress a mere racial imbalance in an employer's workforce. The language of section 703(j) thus reflects a deliberate congressional decision to disapprove race conscious measures only in that one specific circumstance, a legislative decision inconsistent with petitioners' view that Congress intended to ban such measures in all circumstances.

Petitioners also rely on the last sentence of section 706(g), which states:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin....

Petitioners urge that section 706(g) provides that a court may only order the hiring or promotion of individuals who were refused employment or advancement for a discriminatory reason. But section 706(g) simply does not say that. In the case of hiring, for example, section 706(g) literally excludes from a hiring order only previous applicants who were rejected for a legitimate reason. Individuals who had not yet sought and thus were never denied employment do not fall within the literal language of the section 706(g) prohibition. That does not mean, of course, that a remedial decree must treat future applicants in the same way it treats past victims, but indicates only that distinctions between such groups must be based on general remedial considerations, not on any per se limitation on

remedies established by Title VII itself. Here, as with section 703(j), the carefully phrased and narrow limitation in section 706(g) is simply inconsistent with a general congressional intent to exclude future applicants from the scope of a remedial decree.

Neither section 703(j) nor section 706(g), moreover, purports to limit the use of numerical orders as such. The Solicitor General asserts that race conscious remedies, remedies for non-victims, and quotas are, as a practical matter, all the same thing. But the actual experience of the lower courts, and of the Justice Department itself, demonstrates precisely the contrary.

C. The Legislative History of Title VII

Both petitioners and the Solicitor General argue that the legislative history of Title VII demonstrates that Congress intended to forbid any use of numerical remedies. The legislative history on which they rely does contain a number of statements that Title VII would not require or lead to the use of "quotas." If there were some universal consensus that all numerical orders are by definition "quotas," the references to "quotas" in the 1964 debates might support petitioners' view.

But what various individuals and groups mean by the term "quota" varies widely, and what Congress had in mind in 1964 is thus not self-evident. The Solicitor's brief appears to suggest that any numerical order is a quota; but the

Solicitor describes as devoid of quotas some 33 Justice Department consent decrees that are replete with numerical orders. For most of 1985 the Secretary of Labor and the Attorney General have waged a cabinet level battle over the difference between a "goal" and a "quota"; in late January 1986, as this brief was being written, the President still had not decided what types of numerical devices constitute "quotas" and should therefore be excluded from the scope of Executive Order 11246. Several of the amici who join in this brief have long opposed practices they regard as quotas. These amici, however, have never defined "quotas" in the sweeping manner proposed by petitioners and the Solicitor; rather, these amici have maintained that some numerical devices, which they denote as

"goals", are entirely appropriate methods of correcting discrimination on the basis of race, sex and national origin.

The significance of the legislative debates regarding "quotas" must turn on the nature of the practice that members of Congress had in mind in 1964 when they used that term. Although opponents of Title VII repeatedly expressed objections that the legislation required, or would lead to, "quotas", their arguments were not directed at the types of remedies which might prove necessary to redress, prevent or deter actual discrimination. Rather, as both the majority and Justice Rehnquist correctly observed in Weber, 443 U.S. at 205, 231-247, these critics were concerned that the term "discrimination" in Title VII would be interpreted to mean or include "racial imbalance." Thus construed Title VII might have imposed on

employers an absolute and permanent duty to maintain in each job a specific proportion of minorities or women. When critics objected to "quotas," they were arguing that Title VII should not establish, and courts should not enforce, such an obligation. The House Minority Report, for example, asserted that the administration intended to define "discrimination" to include "the lack of racial balance," a definition that would force an employer "to hire according to race, to 'racially balance' those who work for him ... or be in violation of federal law."⁹ H.R. Rep. 914, pt. 1, pp. 67-69.

It was to this specific contention that supporters of Title VII were responding when they made the statements regard-

⁹ See also 110 Cong. Rec. 1620 (Rep. Abernathy), 7418 (Sen. Robertson), 8500 (Sen. Smathers), 9034-35 (Sens. Stennis and Tower), 10513 (Sen. Robertson).

ing quotas on which petitioners and the Solicitor General rely. Most of these assurances were intended to make clear that "employers would not be required to institute preferential quotas to avoid Title VII liability." United Steelworkers v. Weber, 443 U.S. at 205 n. 5.¹⁰ (Emphasis added). Thus when Senator Robertson asserted Title VII would require an employer to replace whites with blacks "to overcome racial balance," Senator Humphrey replied, "The bill does not require that at all ... There is no percentage quota". 110 Cong. Rec. 5092. As Justice Rehnquist noted in Weber, what Senator Humphrey and other supporters "'maintained all along' ... was that it neither required nor

¹⁰ Justice Rehnquist characterized those same statements as assuring Congress that Title VII "did not authorize the imposition of quotas to correct racial imbalance." 443 U.S. at 243 n. 22. (Dissenting opinion).

permitted imposition of preferential quotas to eliminate racial imbalances." 444 U.S. at 248 n.28. (Emphasis omitted and added).

The legislative statements relied on by the Solicitor General were generally preceded or followed by an express reference to the "racial balance" argument to which Title VII supporters were responding. Representative Celler's speech was intended to rebut charges that employers would be required "to rectify existing 'racial or religious imbalance.'" 110 Cong. Rec. 1518. The statement of Representative Lindsay, quoted at note 6 of the Solicitor's brief, is immediately followed by this explanation of why Title VII imposed no quotas: "There is nothing whatever in this bill about racial balance as appears so frequently in the minority

report." 110 Cong. Rec. 1540. Representative Minish gave the same explanation of his interpretation of Title VII.

There is nothing here ... that would require racial balancing ... There is no quota involved. 110 Cong. Rec. 2558.

Senator Humphrey's statement regarding quotas was expressly offered as a reply to charges Title VII would "authorize the Federal government to prescribe 'racial balance' of job classifications or office staffs." 110 Cong. Rec. 5423. Senator Kuchel disputed claims that federal "inspectors would dictate ... racial balance in job classifications, racial balance in membership", 110 Cong. Rec. 6563; it was in response to this particular charge that Senator Kuchel made the statement quoted in note 7 of the Solicitor's brief, and placed in the record the House Republican memorandum cited in note

6 of the Solicitor's brief. 110 Cong. Rec. 6563, 6566. The statement of Senator Humphrey at 110 Cong. Rec. 6549, referred to but not quoted by the Solicitor, reads

There is nothing in [Title VII] that will give any power to ... any Court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent. (Emphasis added).

The singular form of the demonstrative pronoun "that" and the pronoun "it" made clear that Senator Humphrey regarded the quota and racial balance arguments as one and the same objection. The assurance offered by Humphrey and others was not intended to limit the authority of courts to redress, prevent or deter discrimination; supporters of Title VII were simply stating, in the words of Senator Carlson, that the legislation contained "no

authority to require quota hiring to achieve racial balance." 110 Cong. Rec. 10520.

That Congress had in mind this very specific problem, not numerical remedies generally, when it discussed quotas, is clear from the final legislative resolution of this issue. Concerns about quotas continued unabated despite the language discussed earlier in section 706(g), a clear indication that Congress read section 706(g) literally, and thus believed it had no bearing on quotas in any sense. On May 26, 1964, however, the Dirksen-Mansfield substitute was introduced. That substitute for the first time contained the language now found in section 703(j). Although section 703(j) does not restrict the use of numerical remedies for Title VII violations, section 703(j) did preclude the specific require-

ment Congress had in mind in the discussions regarding "quotas." When the language ultimately incorporated in section 703(j) was first proposed by Senator Allott, he explained that it "makes clear that no quota system will be imposed if Title VII becomes law", 110 Cong. Rec. 9881. That assurance would have made no sense unless Congress understood "quota" to refer only to "quotas for racial balance", for only that specific type of order is precluded by section 703(j).¹¹ As Justice Rehnquist

¹¹ Senator Allott commented:

"I have heard over and over again in the last few weeks the charge that Title VII ... would impose a quota system on employers and labor unions.... I do not believe Title VII would result in the imposition of a quota system.... But the argument has been made, and I know that employers are also concerned about the argument. I have, therefore, prepared an amendment which I believe makes clear that no quota system will be imposed if Title VII becomes law. Very briefly, it provides that no finding of unlawful

observed in Weber,

[T]he language of §703(j) is precisely tailored to the objection voiced time and again by Title VII's opponents. Section 703(j) apparently calmed the fears of most of the opponents; after its introduction, complaints concerning racial balance and preferential treatment died down considerably.

¹²
443 U.S. at 244-47. The majority in Weber recognized that section 703(j) was intended as a full response to the frequently expressed concern about "quotas." 443 U.S. at 205.

Section 703(j) is thus of decisive importance in interpreting the Title VII debates regarding "quotas." Section

¹² Elsewhere Justice Rehnquist observed that section 703(j) was "carefully worded to meet, and put to rest, the opposition's charge." 443 U.S. at 246.

703(j) delineates with precision the specific type of requirement which both proponents and opponents of Title VII had in mind when they used the term "quota." Section 703(j) is not, of course, a general prohibition against numerical remedies. Rather, section 703(j) spells out exactly what Title VII proponents meant when they disavowed quotas -- that Title VII did not create, and that courts therefore would not enforce, a general obligation to maintain a racially balanced work force.

This does not mean that Congress intended to express any preference for numerical or race conscious remedies. The language and legislative history of Title VII simply establish no per se rules regarding such orders. General remedial principles, which are thus controlling in a Title VII case, dictate that race con-

scious and numerical remedies not be used either casually or automatically. The federal courts must fashion decrees which will effectively and promptly redress, prevent and deter unlawful discrimination, but race conscious and numerical remedies need not be used where other milder devices would clearly suffice. Where, however, race conscious or numerical remedies are in fact a practical necessity, Title VII, imposes no per se bar to their utilization.

II. THE RACE CONSCIOUS REMEDY IN THIS CASE IS APPROPRIATELY FRAMED TO PREVENT FURTHER DISCRIMINATION

The petitioners in this action are no typical Title VII defendants, and the remedial problems presented by this appeal are far more severe than those which arise in an ordinary civil case. Local 28 of the Sheet Metal Workers has over the

course of two decades of litigation established a record of intransigent resistance to both the law and judicial decrees which is without parallel in the annals of equal employment litigation. Almost 22 years have passed since the issuance of the first court order forbidding Local 28 to engage in racial discrimination against blacks. In the face of that decree Local 28 chose, not to obey the law, but to embark upon a campaign of evasion and resistance which rivaled in its ingenuity and intransigence the most defiant southern school boards and voting officials of a generation ago. While the history of Local 28's scheme of illegality and contempt is complex, one thing is clear: that effort to avoid obedience to federal law has been enormously successful. In 1964, when the first injunction against discrimination

was issued, Local 28 had over 3300 journeyman members, every one of them white. (J.A. 301); today, after two decades of litigation and more than a dozen subsequent court orders, the union still has only 122 non-white journeymen, in a city almost half of whose population is black or Hispanic. (J.A. 50).

More is thus at stake in this appeal than whether Local 28 will be permitted to continue to flout federal and state law and judicial decrees. We recognize that, because Local 28's history of unlawful conduct is exceptional, the remedies necessary here would not necessarily be required to deal with less intransigent defendants. But Local 28 asks this Court, by overturning or eviscerating the outstanding federal court orders, to place a seal of approval on the arsenal of evasive tactics which the union has devised. A

number of opposing amici, well aware of Local 28's extraordinary success in excluding blacks and Hispanics, urge the Court to approve the union's conduct. As the federal courts learned a generation ago in dealing with resistance to the commands of Brown v. Board of Education, 347 U.S. 483 (1954), exceptional intransigence is all too likely to become commonplace if it is not dealt with firmly. Affirmance is required here, as it was required in Cooper v. Aaron, 358 U.S. 1 (1958) and Louisiana v. United States, 380 U.S. 145 (1965), to assure that the deplorable record compiled by Local 28 does not become a judicially authorized model for future defendants.

The first unsuccessful injunction prohibiting Local 28 from engaging in racial discrimination was issued on August 24, 1964 in State Commission for Human

Rights v. Farrell, 252 N.Y.S.2d 649, 43

Misc. 2d 958 (Sup. Ct. N.Y. Co. 1964).

Rather than obey that injunction,

Local 28 flouted the court's mandate by expending union funds to subsidize special training sessions designed to give union members' friends and relatives a competitive edge in taking the [Joint Apprenticeship Committee] battery. JAC obtained an exemption from state affirmative action regulations directed towards the administration of apprenticeship programs on the ground that its program was operating pursuant to court order; yet Justice Markowitz had specifically provided that all such subsequent regulations, to the extent not inconsistent with his order, were to be incorporated therein and applied to JAC's program.

EEOC v. Local 638 (Pet. App. A-352). The state judge repeatedly castigated Local 28 for these tactics, and issued a series of additional orders.¹³ The success of these tactics is testified to by a single

¹³ See cases cited, Respondents Brief in Opposition, p. 2 n.*.

statistic; as of July 1, 1968, four years after the issuance of the state court injunction, Local 28 still had no black journeyman members. (J.A. 334).

On June 29, 1971, respondent EEOC commenced this action alleging that Local 28, despite the issuance of a series of state court injunctions, was still engaged in systematic racial discrimination. (J.A. 372). On July 2, 1974, the district court issued an interim order directing Local 28 to admit 20 non-whites to its next apprenticeship class. (J.A. 363). On October 4, 1974, the United States Attorney was compelled to seek a contempt citation against Local 28, since the union still had not indentured and assigned to employment any of those new non-white apprentices. (J.A. 345). The district court subsequently found that the union had "unilaterally suspended court-ordered

timetables for admission of non-whites to the apprenticeship program pending trial of this action, only completing the admission process under threat of contempt citations." (Pet. App. A-352).

The EEOC action against Local 28 was tried in early 1975. Despite the fact that Local 28 had by then been for 9 years under a state court injunction against discrimination, the district court found that the union had continued to engage in a wide variety of discriminatory practices. (Pet. App. A-330-50). The second circuit properly characterized local 28 as "recalcitrant", and recognized that its discriminatory practices were "contrary to the spirit and letter of the New York court's order". (Pet. App. A-214-15).

The district court realized that a general injunction against racial discrimination by Local 28 would have been

meaningless, since the Local had for 10 years intentionally and systematically violated just such an injunction. Accordingly, the district court attempted to frame an order intended to preclude, not only the types of discrimination to which Local 28 had already resorted, but other possible techniques as well. In July, 1975, the district judge entered a detailed order and injunction prohibiting a variety of forms of discrimination. This was followed in 1975 by a detailed Affirmative Action Plan and Order (AAPO), and in 1976 by Revised Affirmative Action Plan and Order (RAAPO). (Pet. App. A 8). The injunction provided for the selection of a plan administer who was authorized to administer the affirmative action plans and issue additional orders.

These orders were met with the familiar pattern of resistance. Local 28 consistently delayed implementation of the administrator's orders by insisting they be reviewed by the judge. (J.A. 217). Although the RAAPO required Local 28 to seek government funds to provide additional training opportunities, the Local refused to do so. (J.A. 143). In 1980 every one of the 16 journeymen who joined the union by direct admission was white. (JA 99). In 1979 Local 28 amended its agreement with contractors to require, in a period of unemployment, that 20% of all vacancies be reserved for members over the age of 52. The district judge found that this provision discriminated against minority members of Local 28, since over 98% of all members over 52 were white. (Pet. App. A-155; J.A. 48).

¹⁴ The court of appeals found that this

The most important manner in which Local 28 evaded the letter and spirit of the 1975 injunction, AAPO, RAAPO, and the orders of the administrator was by drastically reducing the size of its apprenticeship program, traditionally the primary means of admission to the union. The 1975 injunction and subsequent orders succeeded in regulating in such detail the process of selecting apprentices that discrimination in that phase of Local 28's activities finally become impossible. Between 1977 and 1980 approximately 45% of all indentured apprentices were non-white. (J.A. 96). Local 28 responded to this development by largely shutting down the program. In the four years prior to the 1975 injunction, when non-whites were a comparatively small portion of appren-

provision had not been put in operation.
Pet. App. A-17-18.

tices, Local 28 indentured an average of 543 apprentices a year. In the four years between 1977 and 1981, Local 28 indentured an average of 83 apprentices a year. This drastic reduction in apprenticeships occurred even though apprentice unemployment was far higher in 1971-75 than in 1977-81. (Pet. App. A-151).

Although some of the details of Local 28's evasive tactics may be in controversy, the Local's continued success in minimizing the admission of non-whites is indisputable. In 1974, prior to the issuance of any of the remedial orders at issue, there were 117 non-white journeyman members of Local 28. (J.A. 323).¹⁵ In 1982, some seven years after the district court's injunction and AAPO went into

¹⁵ The figures at J.A. 323 do not include apprentices as union members. Compare J.A. 312 (number of non-white apprentices) with J.A. 323.

effect, there were 122 non-white journeyman members. (J.A. 50). Even this trivial progress is illusory, for the 1982 journeymen include 11 non-whites who were transferred into Local 28 in 1978 at the direction of the International, and who actually work in the blowpipe industry rather than the sheet metal industry. (J.A. 102). On this record the administrator,¹⁶ the district court¹⁷ and court of appeals¹⁸ all understandably found Local 28 in contempt.

¹⁶ Pet. App. A-139 ("a pattern of delay, obstructionism and blatant disregard for court orders that goes back as far as 1965"), A-142 ("passive if not overt, resistance").

¹⁷ Pet. App. A-123 (petitioners "consistently have violated numerous court orders"), A-112 (past violations of court's orders "egregious").

¹⁸ Pet. App. A-13-25.

It is against this background that the challenged portions of the decree must be judged. The purpose of the 29% goal, we believe, is both self-evident and reasonable. By 1975 it was all too clear that Local 28 was determined to use any evasive technique it could devise to minimize the number of minorities admitted to the union. Over a ten year period that union had demonstrated its ability to fashion new discriminatory schemes to replace older methods struck down by a series of state court orders. The federal district court understood full well that, no matter how many discriminatory devices that court might forbid, Local 28 would still be able to devise yet more. To bring to an end this cycle of repeated but ineffective injunctions, the district court included in its order the one type of provision that would clearly be

violated by any effective discriminatory scheme -- a goal of 29% non-white members by 1981. In view of the district judge's particular familiarity with the years of federal litigation which preceeded the order at issue, this Court should give considerable deference to the trial judge's view that the 1982 injunction was necessary to enforce both Title VII and earlier federal decrees.

The 29% goal represented the degree of integration that it was reasonable to expect would naturally occur if Local 28 ended at once all forms of discrimination, and avoided such discrimination in the future. Had Local 28 continued after 1975 to indenture apprentices at the pre-1975 rate, the 29% goal would have been reached long ago. The 1975 injunction did not require Local 28 to give preference to apprentice applicants of any race, and the

1983 injunction, as modified on appeal, does not do so either. To comply with the present goal Local 28 may need to do no more than return the size of its apprentice classes to the pre-1975 level, and assure that construction work is shared equitably between those apprentices and the virtually all-white journeymen. In 1977, when circumstances beyond the union's control made compliance with the 1981 deadline more difficult, the district judge extended that deadline for a year on the motion of the plaintiffs. (J.A. 163). There is no reason to doubt that the judge would be equally willing to modify the requirements of his present order if future developments warrant.

In its original contempt decision the district court indicated its intention to impose a fine on Local 28. (Pet. App. A-126). The district court subsequently

ordered, "in lieu of" fines for the various acts of contempt, that Local 28 and other petitioners make certain payments into a Fund to be utilized to provide sheet metal training for non-whites. The Fund's training activities can include operation of a training program, stipends or loans to blacks and Hispanics in existing programs, and part-time or summer sheet metal jobs for youths between 16 and 19. (Pet. App. A-113-118). This order, like the goal, was reasonably framed as a method to prevent future discrimination. In light of Local 28's record of discrimination, the district court could reasonably anticipate that black applicants will still face significant obstacles in winning membership in the union, despite the hoped for effect of the new injunctive relief. The training and experience that the Fund can

provide will increase the ability of blacks to overcome those obstacles, and will do so in a manner less severe in its impact on whites than an order establishing a race conscious membership rule.

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JULIUS L. CHAMBERS

RONALD L. ELLIS

CLYDE E. MURPHY

PENDA D. HAIR

ERIC SCHNAPPER*

NAACP Legal Defense and

Educational Fund, Inc.

16th Floor

99 Hudson Street

New York, New York 10013

(212) 219-1900

Counsel for Amici

*Counsel of Record

(A complete list of counsel is
set out on pp. ii)

AMICUS CURIAE

BRIEF

JAN 24 1986

JOSEPH F. SPANIOLO, JR.
CLERK

Nos. 84-1656 and 84-1999

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION, AND LOCAL 28
JOINT APPRENTICESHIP COMMITTEE,

Petitioners

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
et al.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS, AFL-CIO, C.I.C.,

Petitioners

vs.

CITY OF CLEVELAND, et al.
AND
VANGUARDS OF CLEVELAND,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF FOR THE CITY OF BIRMINGHAM, ALABAMA
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS**

Counsel of Record

JAMES K. BAKER
City Attorney
CITY OF BIRMINGHAM
600 City Hall
Birmingham, AL 35203
(205) 254-2372

JAMES P. ALEXANDER
LINDA A. FRIEDMAN
GREGORY H. HAWLEY
BRADLEY, ARANT,
ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

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The City of Birmingham, Alabama submits this brief Amicus Curiae pursuant to United States Supreme Court Rule 36.4.

Interest of the Amicus Curiae

The City of Birmingham is unusually well qualified to assess the arguments presented in these consolidated cases. Birmingham's history in racial matters is regrettable and well known. Further, its awakening to its obligations of non-discrimination was brought about only through prodding by the federal government and by extensive litigation. Recently, however, Birmingham has made progress in changing both racial attitudes and stratified municipal employment patterns. This progress, in part, is attributed to the successful implementation of affirmative action goals in employment. Most importantly, the City of Birmingham has determined that its earlier grudging acceptance of affirmative action was misplaced pessimism. Through the growing representation of all segments of society in its municipal departments, those departments — especially fire and police — are better able to serve and protect all citizens of Birmingham in every neighborhood and community in the City.

Birmingham, like Cleveland, agreed in a conscientiously-constructed consent decree (hereinafter referred to as "Birmingham Decree" and "Cleveland Decree," respectively) to race and gender-conscious affirmative action designed to remedy the pernicious effects of past discrimination against blacks and women. Like the Cleveland Decree, the Birmingham Decree has been challenged by white municipal employees who, to a degree, are the certain beneficiaries of the City's past discriminatory policies. Unlike the Cleveland action, however, where all plaintiffs are private parties, the Birmingham litigation that resulted in the adoption of the Birmingham Decree was brought by the United States as well as by private parties. Moreover, the Justice Department took the lead in forging the goal remedies in the Birmingham Decree. Despite this earlier role, however, the United States now is an aggressive advocate

in reverse-discrimination litigation collaterally attacking employment decisions required by the very decree it constructed.

In 1974, several blacks and an area NAACP chapter brought employment discrimination lawsuits against the Jefferson County Personnel Board (the local civil service system) and the City of Birmingham under Title VII of the Civil Rights Act of 1964, as amended. Subsequently, the Department of Justice also filed a Title VII pattern and practice action against the City, other municipalities, and other governmental entities, charging them with pervasive race and sex discrimination in employment. The cases were consolidated in federal district court in Birmingham. Over the course of approximately seven years, some issues — involving applicant testing for entry level police and fire jobs — were tried to conclusion; other issues were extensively prepared for litigation.

Prior to settlement of the actions, some of the issues pertaining to municipal employment were litigated in two separate trials. In 1977, the trial court ruled that tests used to screen and rank applicants for employment as police officers and firefighters discriminated against blacks. That decision was affirmed on appeal. *Ensley Branch of the N.A.A.C.P. v. Seibels*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980). In a second trial in 1979, other employment tests, qualifications and practices were challenged. Finally, with the active participation of the Department of Justice, all parties — the City, the Department of Justice, and the private plaintiffs — entered into negotiations to settle the lawsuits. Prior to an announcement of the decision of the 1979 trial, negotiations yielded a Court-approved consent decree, signed by the private plaintiffs, by the City of Birmingham, and by the Department of Justice, which became effective on August 21, 1981.

As its lynchpin, the Birmingham Decree includes an affirmative action program whose long-term goal was to achieve a municipal work force whose percentages of whites, blacks and women were in reasonable proportion to the percentages of those groups in the labor force of Jefferson County. The decree also provides interim goals that encouraged the City to

hire and promote qualified blacks and women, where available, to City jobs at rates that range from fifteen percent (15%) to thirty percent (30%) annually for women and that range from thirty-three percent (33%) to fifty percent (50%) annually for blacks. For the past four years, the City has complied with the consent decree goals to the extent that persons qualified for hiring or promotion were available. Because the Birmingham Decree had goals — and not quotas — the City was never compelled to hire any particular individual who was not qualified for his or her position.

Moreover, the Birmingham Decree contained a provision to “immunize” the City from liability in subsequent discrimination claims brought by passed-over employees for the City’s failure, *inter alia*, to promote an employee pursuant to the affirmative action goals. That provision, in paragraph 2, stated: “Nothing herein shall be interpreted as *requiring* the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer, or promote a less-qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job-related selection procedure.” (emphasis added). This provision allowed the City the flexibility to decline to hire or promote an individual, even though that individual might otherwise be a candidate for hire or promotion under the Birmingham Decree.

Finally, paragraph 3 of the Birmingham Decree provided that “the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation, or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack.” In short, the City understood that the consent decree provided redress for past discrimination, protected the municipal treasury from potentially catastrophic liability, allowed the City to maintain qualified employees consistent with the local civil service law, and required all parties to defend the decree so that, among other things, the City would not have to expend taxpayer dollars on legal fees for the defense of employment

discrimination lawsuits. After seven years of litigation, the City hoped to put those tax dollars to constructive use.

In 1984 (ten years after the first suit against Birmingham had been brought and three years after that litigation was settled by entry of consent decree), Birmingham was sued for alleged reverse discrimination by whites who charged that the Birmingham Decree, and Birmingham's implementation of that decree, unlawfully deprived them of employment opportunities. Much to the surprise of Birmingham, the Justice Department intervened in vigorous support of the white individuals and challenged the City's implementation of the Birmingham Decree. In December of 1985, after a full trial in two consolidated actions pertaining to two of the City's departments, the district court rejected the claims of reverse discrimination, finding, *inter alia*, that although Birmingham considered race and sex in promotions, it did so pursuant to a valid consent decree. *In re Birmingham Reverse Discrimination Employment Litigation*, CV-84-P-0903-S (N.D.Ala. Dec. 20, 1985). In upholding the lawfulness of the consent decree, the district court followed the Eleventh Circuit Court of Appeals' precedent which upholds race-conscious remedies that benefit persons not shown to be victims of discrimination, when the remedies are not imposed under circumstances that existed in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and otherwise comport with the guidance provided in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985).

The results of the hiring and promotion goals in the Birmingham Decree are clear. The City of Birmingham is finally beginning to have a municipal work force, particularly a police force and fire department, that reflects Birmingham's multi-racial community. This reflection of Birmingham's pluralism gives municipal departments a much needed familiarity with the customs, standards and experiences that exist in the various communities in Birmingham, and allows the City of Birmingham to render the quality of services that are necessary to serve the entire community. For example, the Birmingham Police

Department currently has about one and a half times more blacks employed than at the time of the entry of the Decree. The number of black police sergeants has increased from *three* in 1981 to twenty-four in 1986. The number of black police lieutenants has increased from *zero* to three. The number of black police captains has increased from *zero* to one (promoted in 1985).

In the Birmingham Fire & Rescue Service, the number of blacks has almost doubled since the signing of the decree. In the officer ranks of the Birmingham Fire Department, there are now thirteen lieutenants and one captain who are black. At the time of the decree, there were no blacks employed above the entry level rank of firefighter.

The twenty percent (20%) black representation in the Birmingham Police Department and the twelve percent (12%) black representation in the Birmingham Fire & Rescue Service remain modest percentages for a city whose population exceeds fifty percent (50%) black. But even those small fair employment advances are almost entirely attributable to the employment goals and timetables which the Birmingham Decree directs the City of Birmingham to follow.

The issues in these consolidated cases are, therefore, of vital interest to the City of Birmingham for a variety of reasons. First, this Court's ruling may affect any appeal taken in the Birmingham Reverse Discrimination Litigation, as well as affect the outcome of three other reverse discrimination actions evolving from the consent decree promotions now pending against the City of Birmingham. Second, this Court's ruling will determine whether the Birmingham Decree, signed by Birmingham with the intent of putting behind it the many years of discriminatory employment practices, of rectifying the consequences of those practices, and of ending interminable litigation, will in fact have those intended effects. Third, this Court's ruling will send a much-needed message to the lower courts and to all potential litigants by clarifying and reinforcing the continued viability of affirmative action incorporated in court decrees.

Birmingham's recent experience litigating reverse discrimination claims brought by white plaintiffs and by the Department of Justice compels the City to indicate to this Court that the arguments presented in the briefs of the United States and the Equal Employment Opportunity Commission reflect a political bias that is contrary to the long-held positions of these entities and that does not represent Congressional intent. The City of Birmingham has been betrayed not only by a Justice Department whose philosophy has changed over the past five years, but by a Justice Department that consistently refused to abide by its self-imposed and court-approved obligations in the Birmingham Decree.

In the *Birmingham Reverse Discrimination Litigation*, the Justice Department presented arguments that were ambiguous, perplexing, and at times, directly contrary to arguments that it had earlier presented in the original Birmingham Decree litigation. Accordingly, the arguments of the EEOC (presented on its behalf by the Department of Justice in *Sheet Metal Workers*, No. 84-1656) are not due the deference normally accorded interpretations by governmental bodies of statutes they administer and enforce. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n. 4 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976). The similar arguments of the United States, *Amicus Curiae* in *Vanguards of Cleveland*, No. 84-1999 (also presented by the Department of Justice), are not only entitled to no deference, but are patently suspect inasmuch as they represent complete abandonment of the positions historically advanced by the Department.

SUMMARY OF THE ARGUMENT

The United States Department of Justice had for years advocated and obtained court-ordered race-conscious and gender-conscious remedies in employment discrimination litigation. The Department sought, authored and obtained such a decree in litigation with *Amicus*, the City of Birmingham, as well as with other jurisdictions and private employers across the coun-

try. The Department has consistently contended in these actions that such remedies are lawful as well as necessary to effectuate the purposes of Title VII.

The government made the same arguments in support of the lawfulness and need for minority-conscious goals to this Honorable Court when the case of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), was before this Court. In defending the lawfulness of such remedies, the government expressly contended that goals may benefit an entire class, some of whose members were victims of discrimination, without being limited solely to the actual victims.

The government's historical position in support of the very kinds of goals contained in the decrees now before this Court, not its recent abandonment of that position, is entitled to considerable deference. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n. 4 (1977). Indeed, the historical position is the legally correct position.

Race and gender conscious remedies are necessary to effectuate the goals of Title VII. Such remedies are not unfair to non-minorities even if they benefit individuals not shown to have been victims of discrimination. Guidance provided by this Court in its previous decisions, including in *Weber*, *supra*, assures that non-minorities do not unfairly bear the burdens of the affirmative action goals because such goals are approved or imposed by the lower courts only after considering the need for the goals, their impact on non-minorities, and other relevant factors.

The experience of the *Amicus* demonstrates that the goals contained in its consent decree were necessary to achieve meaningful employment opportunities for minorities in Birmingham, Alabama. *Amicus'* experience has also demonstrated that this achievement has not occurred at the expense of non-minorities. Finally, the experience of *Amicus* demonstrates the crucial need for an employer, particularly a municipal employer with scarce funds, to be able to settle employment discrimination litigation on a basis that is fair to its employees, minorities and non-minorities alike, and also on a basis that relieves the

employer of being forced to participate in protracted and expensive litigation. The consent decree signed by *Amicus* and by the City of Cleveland are such decrees and, along with the decree imposed upon the Sheet Metal Workers after litigation, are authorized by Title VII.

ARGUMENT

I. The United States Department of Justice Had For Years Advocated Court-Ordered Race-Conscious Remedies As Lawful and Necessary

A. *The United States Advocated and Obtained Race-Conscious Remedies in Litigation with Birmingham and Other Jurisdictions Across the Country*

The Department of Justice sought, authored and obtained in Birmingham's litigation a consent decree containing race and gender-conscious aspects which are similar to provisions of decrees before this Court which are being attacked.

The Birmingham Decree contains gender specific hiring and promotion goals that permit, and indeed compel, Birmingham to hire and promote qualified minorities in preference to qualified non-minorities. For example, the interim relief provided in the Birmingham Decree requires the City to fill 50% of certain vacancies in the police and fire departments with blacks who are qualified and are available for promotion and to promote qualified blacks to subsequent vacancies in higher level positions at twice the percentage of blacks in the positions from which promotions are traditionally made.¹ While the decree does not compel Birmingham to hire or promote an unqualified or less qualified minority in preference to a person who is "demonstrably better qualified based on the results of a job related selection procedure,"² it does not otherwise permit Bir-

¹Other similar percentages and ratios are prescribed for female promotions and for blacks and females hired into entry-level jobs.

²Paragraph 2 of the decree reads, in pertinent part: "Nothing shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer

mingham to prefer a qualified non-minority over a qualified, but arguably less qualified, minority if doing so would prevent Birmingham from meeting prescribed hiring or promotional ratios. The decree, therefore, contemplates that in some instances, minorities who have not been found to be actual victims of past discrimination will be preferred over whites.

At the hearing held in 1981 to determine the fairness of the proposed Birmingham Decree, this matter was directly addressed when the decree was explained as requiring preferential treatment of qualified minorities over more qualified non-minorities, without any condition that the less qualified minorities be actual victims.³ The government unequivocally represented this feature of the decree to be lawful.⁴ When the decree was challenged in Court by white employees of the City Engineering Department, the Justice Department filed, on October 12, 1982, a motion to dismiss the challenge or alternatively a motion for summary judgment in favor of the City of Birmingham and other defendants. The Justice Department maintained that the white plaintiffs' action "constitute[d] an impermissible collateral attack on the lawfully entered Consent Decrees" entered into by the United States and the City of Birmingham and the Jefferson County Personnel Board. United States' Motion to Dismiss or Alternatively Motion for Summary

or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure."

³In response to the district court's question of how Birmingham would choose between qualified blacks and whites, the City responded:

Assuming that both the whites and blacks were both qualified, but assuming . . . the whites were perceived to be better, if the blacks were perceived minimally qualified, and we required additional blacks to meet our goals, then we would take them.

August 3, 1981 Hearing at 63, *United States v. Jefferson County*, No. 75-P-0666-S (N.D. Ala. Aug. 21, 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1981). The government did not differ from that view.

⁴The Justice Department's representative stated: "We believe to the extent that the two decrees contain affirmative hiring goals and promotion goals for blacks and women, that these goals are lawful that they do not unlawfully discriminate against whites." *Id.* at 40.

Judgment, *Birmingham Association of City Employees v. Arrington*, No. CV-82-P-1852-S (N.D. Ala. filed Oct. 12, 1982) (later consolidated with other actions, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*).

Two years later, however, the Justice Department made known its intention to enter a reverse discrimination lawsuit against the City of Birmingham as a party plaintiff, thereby aligning itself with white private plaintiffs who were challenging the modest promotions made pursuant to the affirmative action goals of the Birmingham Decree. Paradoxically, however, despite its stated intention to intervene as a party plaintiff and contest promotions made pursuant to the decree's goals, the Justice Department also vowed that the United States plans "vigorously to defend the validity of those Consent Decrees and to defend the validity of any remedial measures required by those Consent Decrees." Hearing at 29 *Welks v. Arrington*, No. CV-83-AR-2116-S and *Zannis v. Arrington*, No. CV-83-AR-2180-S (N.D. Ala. Feb. 28, 1984) (later consolidated with other actions, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*). The City of Birmingham continues to be perplexed by the Justice Department's contradictions.

On May 4, 1984, the Justice Department filed a brief in the Birmingham reverse discrimination case that presented a most disingenuous interpretation of the goals provided in the consent decree. The brief stated that the goals and preferences as to race and sex in hiring and promotion take race into account only in "tie-breaker situations," that is, when two candidates in every respect are equally well qualified. Memorandum of the United States In Response to Motions of Defendants Arrington and City of Birmingham and the Defendant-Intervenors at 12-13, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*, (filed May 4, 1984). The Justice Department advocated that theory in a hearing on July 3, 1985, when it argued that "the decree would contemplate a tie-breaker use of race, but that would be it. . . ." July 3, 1985 Hearing at 14, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*.

After hearing of the tie-breaker theory of the consent decree, the district court summarily rejected the government's contention and reminded the Justice Department that the words of the decree contain much broader mandates. May 14, 1984 Hearing at 23, *In re Birmingham Reverse Discrimination Employment Litigation*. Yet, despite the Justice Department's attempt to disavow the unambiguous text and only logical meaning of the decree it had devised, and despite the United States' entry as a party plaintiff in the reverse discrimination action, the Justice Department advised the district court that "the United States has every intention of vigorously defending the validity of the Decree and of all the relief required by the Decree" and that "we have not taken one false step from that commitment. . . ." The district court replied: "That is a matter that obviously is debatable." *Id.* at 38.

The only arguable justification for the Justice Department's attack on the consent decree in the hearing of February 1984, the motion of March 1984, the May 1984 brief and the May 1984 hearing would be that the Justice Department's failure to defend the decree was justified by *Stotts*. Yet, this Court did not render its decision in *Stotts* until June 12, 1984, months after the Department's about-face. Moreover, none of the courts of appeal prior to *Stotts* had rendered any decisions that in any way could have impugned the validity of the Birmingham Decree's race and gender conscious goals, and none of the courts of appeal since *Stotts* has construed *Stotts* to invalidate such goals in consent decrees or even in litigated matters where the goals do not abrogate *bona fide* seniority systems.

The Justice Department's narrow and facile interpretation of the Birmingham Decree eviscerates the decree, as there are rarely, and perhaps never, occasions to select between *equally* qualified candidates and, if the occasion should arise, it would be so rare as to have no meaningful impact on minority workforce representation. The conclusion is inescapable that the government's present interpretation of the Birmingham Decree has evolved by way of hindsight to be consistent with the government's newspeak view of affirmative action.

Even now, after years of litigation, after a trial, and after a judgment for the City of Birmingham, the City remains confused by the Justice Department's interpretation of paragraph 3 of the Birmingham Decree, which requires the Department to defend the decree against collateral attack. The Department's contradictory intervention on behalf of white plaintiffs coupled with its cynical vow to defend the decree according to the dictates of paragraph 3 still astonish the City of Birmingham. The present view is a repudiation of and consequently an abdication of the government's long-time role in securing compliance with Title VII through goals and timetables. While this new governmental policy first surfaced in the Birmingham action prior to the *Stotts* decision, the government obviously has embraced *Stotts* as a justification for its actions in attempting to dismantle the carefully-wrought Birmingham Decree as well as dozens of similar decrees previously sought, promoted and signed by the government.⁵ The government's broad interpretation of *Stotts* is unjustified. It does not represent a colorable reconsideration of statutory construction or of the intent of Congress when Title VII was enacted, but rather represents nothing more than the political rhetoric and apology of the current Justice Department.

This hidden agenda of the government — its plan to persuade courts to adopt as law the Department's abdication of affirmative action — is not immediately apparent from the government's briefs in these pending cases, but is abundantly clear from actions taken by the government in the Birmingham Reverse Discrimination Litigation. In the Birmingham cases, the government advocated and obtained the imposition of gender and race-conscious goals, remedies considered by all parties and the court as plainly lawful, and vowed to defend the decree

⁵The Justice Department has invited some 51 jurisdictions across the country, which are subject to decrees containing race and/or gender conscious goals, to join the Department in seeking to reopen the decrees and to eliminate the minority-conscious goals. Hearing on the Nomination of William Bradford Reynolds to be Associate Attorney General, 99th Cong., 1st Sess. 91-92 (June 4, 1985).

against collateral attack. Later, with a change in leadership in the Justice Department, the government led the attack on the decree by proffering a narrow construction of the Birmingham Decree that was plainly contrary to its express wording and contrary to the parties' intentions. Moreover, the government's narrow interpretation could not be justified as necessary to render the decree lawful except under a very broad reading of *Stotts*. No court of appeals, however, has yet interpreted *Stotts* so broadly as would be necessary to invalidate the Birmingham Decree or the decrees now being challenged by petitioners in these two consolidated actions.

In inviting this Court to accept its narrow view of permissible remedies under Title VII and the United States Constitution, the government implicitly suggests that its present interpretation of the Constitution and of Congressional intent is the Department's long-standing interpretation. However, for years (and as recently as August 1981 when the Birmingham Decree was entered), the Justice Department actively sought, obtained and defended the very remedies it now contends are unlawful.

The Birmingham litigation is just one of dozens of similar actions across the country in which the government obtained race-conscious remedies of the kind imposed in the cases now before this Court. Indeed, the Civil Rights Commission in 1972 credited the Civil Rights Division of the Justice Department for having brought or participated as the Amicus in the cases resulting in "the landmark decisions sustaining the use of numerical goals and timetables as a remedy for past discrimination." 1972 Civil Rights Commission Report 277 n. 76. See, e.g., *United States v. Local 86, Ironmakers*, 443 F.2d 541, 553 (9th Cir. 1971). This historical role of the government reflects the statutory interpretation that warrants the deference normally accorded a governmental agency charged with the statute's enforcement. *Satty, supra*, 434 U.S. at 142 n. 4.

B. *The United States Advocated Race-Conscious Remedies As Lawful and Necessary Before This Honorable Court*

Just as the United States, by way of hindsight, developed a constrained interpretation of the Birmingham Decree which differed from the government's interpretation at the time of signing, the United States has recently developed and is now proposing to this Court a view of Title VII and of Congressional intent that differs from the position it previously took in this Court.

In its brief before this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the government went to great lengths to explain that race-conscious remedies are lawful and necessary. While *Weber* involved a voluntary affirmative action plan, as opposed to one imposed by a court or with a court's approval, the government in *Weber* did not confine its defense of affirmative action to such voluntary plans. In 1979 the government represented to this Court:

Yet while the court of appeals acknowledged that an employer can lawfully take race-conscious action to remedy its prior discrimination, the court held that such action is permissible only in very limited circumstances: to justify the race-conscious action, according to the court of appeals, the employer must prove that it engaged in discrimination, and its remedial action must be limited to benefiting the particular victims of its discriminatory conduct. *In our view, this standard is too narrow.*

Brief for the United States and the Equal Employment Opportunity Commission in *United Steelworkers of America v. Weber*, (Jan. 30, 1979) (hereinafter "U.S.A./E.E.O.C. *Weber* brief") at 16-17. (Emphasis added).

Because Kaiser's affirmative action plan was not implemented pursuant to a court decree, this Court in *Weber* did not address whether the affirmative action plan which it held to be lawful could have been lawfully imposed by a court. Petitioners' argument that Section 703(g) of Title VII would prevent a court from implementing a *Weber*-type affirmative

action plan is contrary to the government's position in *Weber*. There the government argued:

A court could have imposed such a remedy [as was adopted by Kaiser] if, after litigation, it had found that Kaiser had discriminated against blacks. The legislative history of Title VII establishes that numerical race-conscious measures, such as the Gramercy training programs, were contemplated as appropriate relief for courts to grant if they were necessary to remedy proven discrimination. And even without an admission or finding of discrimination, the same program could have been incorporated into a consent decree in settlement of litigation.

U.S.A./E.E.O.C. *Weber* brief at 18-19.

Noting that consent decrees "commonly contain affirmative action obligations, including goals and timetables" and that the validity of such decrees is "not undermined by disclaimers of past discrimination," the government insisted in its *Weber* brief that affirmative action — whether court-imposed or otherwise — need not be confined to proven victims of discrimination:

[A]s in the case of settlement agreements and consent decrees, the court should not insist on clear proof of a violation by the employer against the particular persons benefited by the affirmative action program.

* * *

It is true . . . that the blacks selected for the training programs had not been identified as victims of prior discrimination. . . . But . . . class-wide numerical relief need not always be limited to identifiable victims.

U.S.A./E.E.O.C. *Weber* brief at 40, 52.

In 1979, the government understood Title VII's legislative history as permitting race-conscious goals and Section 706(g) as not intended to prohibit such remedies. The government explained that the concern raised by *some* Congressmen that the Act would require the use of quota systems led to assurances by the Act's sponsors that the Act did not require employers to maintain racially balanced work forces. These assurances, how-

ever, "did not suggest restrictions on remedies that could be ordered after a finding of discrimination." U.S.A. E.E.O.C. *Weber* brief at 29. Rather, Congress intended to preserve management prerogatives to the fullest extent possible, *in the absence of discrimination*. As explained by the government in 1979, "the last sentence of Section 706(g) simply stated that a court could not order relief under the authority of the Act if employers took action against employees or applicants on grounds other than those prohibited by the Act" and "did not in any way restrict the scope of the remedies [such as race-conscious numerical goals] that could be ordered for the kinds of discrimination prohibited by the Act." U.S.A. E.E.O.C. *Weber* brief at 30-31.

The government's extensive review of the legislative history of the 1972 amendments to Title VII led it to conclude, in 1979, that "[a]ny doubts that Title VII authorized the use of race-conscious remedies were put to rest with the enactment of the Equal Employment Opportunity Act of 1972. . . ." U.S.A. E.E.O.C. *Weber* brief at 31. As noted by the government, Congress in 1972 was aware of the numerous court decisions ordering or upholding numerical relief as a remedy for violations of Title VII, and expressly stated its intent, in the Act's section-by-section analysis, to continue that case law. U.S.A. E.E.O.C. *Weber* brief at 32-33, 34 n. 17 (citing such cases in 5th, 7th, 8th and 9th circuits and citing S. Rep. No. 92-115, 92d Cong., 1st Sess. at 21, 27-28 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 8, 13 (1971); 118 Cong. Rec. 1664-1676, 7166 (1972)).

Senator Javits opposed a proposed amendment to restrict federal agencies from ordering the use of numerical ratios in hiring, arguing that such a restriction "would deprive the courts of the opportunity to order affirmative action under Title VII . . . in order to correct a history of unjust and illegal discrimination . . ." and "would torpedo orders of courts seeking to correct a history of unjust discrimination . . . because it would prevent the court from ordering specific measures which would assign specific percentages of minorities that had to be

hired. . . ." *Id.* at 1665, 1667, cited in U.S.A. E.E.O.C. *Weber* brief at 33-34. The government further noted that the other co-floor leader, Senator Williams, also opposed any prohibition of numerical relief because such a prohibition "would strip Title VII . . . of all its basic fiber." 118 Cong. Rec. 1676 (cited in U.S.A. E.E.O.C. *Weber* brief at 34).

According to the government, these views "prevailed in the Senate" and "were shared by the House, where the committee that reported out the bill wrote:

'Affirmative action is relevant not only to enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination'."

U.S.A. E.E.O.C. *Weber* brief at 31, quoting H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 16 (1971).

Thus the government concluded in 1979:

In light of Congress's keen awareness of the kinds of remedies courts had been granting in Title VII cases, and in light of the protests from Senator Ervin and others over the use of race-conscious remedies, this amendment to Section 706(g) provides substantial support for the proposition that Congress intended that numerical, race-conscious relief is available under Title VII to remedy employment discrimination.

U.S.A. E.E.O.C. *Weber* brief at 35.

We recognize that this Court's principal opinion in *Stotts* was influenced to some extent by statements in the Congressional Record which, at first blush, seem at variance with the government's analysis of legislative history in its *Weber* brief. *Stotts*, 104 S. Ct. 2576, ___, 81 L.Ed.2d 483, 500-01. Considering that this Court in *Stotts* was reviewing racial distinctions in layoffs imposed over the opposition of a party and in contravention of a collectively-bargained *bona fide* seniority system, the Court's review of legislative history was made with such facts in mind. This Court's statements in *Stotts* about Congressional intent should be considered in the context of the

intent under consideration — *i.e.*, Congress' intent to permit or prohibit a court-ordered racial quota over a party's objection when the quota overrides non-minority seniority rights in preference to minorities who are not proven victims of discrimination. Since this Court in *Stotts* was not attempting to discern Congressional intent with respect to racial quotas consented to by the parties or imposed pursuant to findings of discrimination, nor was it discerning Congressional intent with respect to racial quotas which do not abridge rights in a *bona fide* seniority system devoid of intentional discrimination, we invite this Court to reconsider legislative history in light of the facts presented by the cases now before it. We especially invite the Court to review the analysis of legislative history in the government's 1979 *Weber* brief, made much closer in time to the history under consideration and at a time when the government was still advocating the use of employment goals as necessary and lawful remedies without regard to whether they benefit actual victims of discrimination. The legislative history does not disclose an *intent of Congress* (in contrast perhaps to intent of some individual Congressmen) to prohibit race-conscious remedies of the kind imposed by consent decree upon the cities of Birmingham and Cleveland or imposed by the court upon Local 28 of the Sheet Metal Workers.⁶

The government's long-standing construction of Title VII as permitting a court to impose race-conscious remedies, evidenced by its securing such relief in countless actions, including Birmingham's litigation, and by its brief in *Weber*, is entitled to considerable deference. The government's recently-contrived construction of legislative history and its misreading of *Stotts* is nothing more than a retrenchment motivated by policies (adopted prior to *Stotts* and without regard to the ex-

⁶Of course, the Fourteenth Amendment provides an additional and independent basis for race-conscious relief in suits against municipalities such as Cleveland and Birmingham, although it was not an available basis for relief in *Stotts*. Congressional intent with respect to Section 706(g) is irrelevant to remedies available in such actions. *Paradise v. Prescott*, 767 F.2d 1514, 1529 (11th Cir. 1985).

isting case law) that are at odds with the purpose and intent of Title VII.

Unless this Honorable Court clarifies its holding in *Stotts* by limiting it to the facts of that case, reaffirms its approval of affirmative action as approved in *Weber*, and explicitly approves the actions of its lower courts in imposing race-conscious remedies where necessary to remedy past discrimination, it will send a fateful message to the government and to individuals who are, or may be, subject to discrimination. That message will sound the death knell of Title VII in all but the most narrow of circumstances, as it would encourage the government to undo all progress gained through years of vigorous enforcement of Title VII.

II. Race-Conscious Remedies Are Appropriate, Without Regard to Proof of Discrimination Against Each Beneficiary of the Remedies, as They Are Necessary to Effectuate the Goals of Title VII and Are Not Unfair to Individuals Not Benefited By Them

A. Race-Conscious Remedies That Are Not Victim-Specific Are Necessary To Effectuate Title VII's Goals

The mandate for race-conscious remedies can be demonstrated by Birmingham's employment history before and after entry of its consent decree. As of January 1, 1966, Birmingham had a total of 9 black employees out of a total of 1,689 employees in its classified services, which consists of higher paying jobs. On the other hand, the unclassified service, which consists primarily of casual laborers, was predominantly black.

In January, 1975, the year the Justice Department sued Birmingham for employment discrimination, the City had only 155 black classified employees out of a total classified workforce of 2,223 persons. The unclassified service remained predominantly black.

Employment discrimination was clearly evident in hiring black police officers and firefighters. It was not until 1966 that Birmingham hired its first black police officer. Ten years later, after the City was sued for employment discrimination by the Justice Department, only 28, or 5%, of the sworn officers were black. There were two black sergeants. No black had a rank above sergeant. Hearing on the Nomination of William Bradford Reynolds to be Associate Attorney General, 99th Cong., 1st Sess. (June 5, 1985) (Statement of W. Gordon Graham, Personnel Officer, City of Birmingham). The City's first black firefighter was not hired until 1968. In 1966, only 13, or 2.1%, of the firefighters were black.

In July, 1981, just before entry of the Birmingham Decree, the effects of past discrimination against blacks persisted in Birmingham's police and fire departments — notwithstanding the district court's race-conscious order in 1977 requiring consideration (but not otherwise requiring *selection*) of more blacks in these departments, and despite Birmingham's adoption of *voluntary* affirmative action plans. *United States v. Jefferson County*, No. 75-P-0666-S (Aug. 21, 1981), *aff'd* 720 F.2d 1511 (11th Cir. 1984). As of July 21, 1981, 79 of Birmingham's 480 police officers were black, 3 of its 131 police sergeants were black, and none of its 40 police lieutenants and captains was black. In the fire department, 42 of the 453 firefighters were black, and none of the 140 lieutenants, captains and battalion chiefs was black. *Id.*

Similarly disproportionate statistics existed with respect to employment of females in the same departments, where for many years positions were restricted to males. *Id.* at 8.

Clearly, the mere elimination of the long-standing barriers to employment of blacks and females — something that had already been accomplished before entry of the Birmingham Decree — was inadequate to remedy the effects of such pervasive historical discrimination. Since entry of the decree in 1981, opportunities for blacks and females have been enhanced, though not at the expense of qualified white males. In the four years after entry of the decree, Birmingham hired 130

police officers of which 67 were white and 63 were black; 92 were male and 38 female. There were 50 police sergeant promotions — 27 white and 23 black; 38 male and 12 female. Of 10 lieutenant promotions, 7 were white and 3 black; 9 were male and 1 was female. In the Fire and Rescue Service, Birmingham hired 85 firefighters of which 47 were white and 38 black; 82 were male and 3 female (prior to the Birmingham Decree no females had been employed). In this period, mid-1981 to mid-1985, there were 29 fire lieutenant promotions, 17 white and 12 black. Of the 10 captain promotions, 9 were black and 1 white.

Absent the consent decree, this modest progress would not have been made. It is the only mechanism available to the City to assure equal employment opportunity.⁷ Yet, without the consent decree, Birmingham would be subject to new charges of race and sex discrimination, especially given the nature of an archaic civil service system, which has become a powerful lobby for the status quo.

It is equally apparent that the race-conscious remedies imposed by consent decree upon the City of Cleveland and by court order on the Sheet Metal Workers were necessary and appropriate remedies to overcome the effects of past discrimination. Although *de jure* segregation in Cleveland's municipal employment was halted before it ceased in Birmingham, the *de facto* segregation in Cleveland's police and fire departments was historically well-entrenched prior to the entry of the Cleveland Decree. Department custom and practice effectively prevented blacks from joining or advancing within municipal em-

⁷This is particularly true since the civil service system under which Birmingham operates places the responsibility for testing and identifying qualified candidates with an independent entity, the Jefferson County Personnel Board, which is subject to a separate consent decree entered contemporaneously with Birmingham's decree. Without the race-conscious remedies in the Board's decree, namely the requirement that candidate certifications include sufficient numbers of minorities to enable Birmingham to meet its goals, Birmingham would have no mechanism — as none is provided under state law — to assure that minorities are even considered for a given job.

ployment. Through the Cleveland Decree, however, the City of Cleveland, like the City of Birmingham, has made progress in providing equal employment.

Any claims that race-conscious remedies other than those which benefit actual victims of discrimination are not necessary and would not frustrate settlement of Title VII actions ignore reality. The United States suggests that parties may

agree on a formula for identifying class members who have been injured and for determining the degree of their injury. . . . If the formula is simple and mechanical, the parties will have no trouble applying it themselves. *Even if the formula is complex or requires judgments about the facts relating to individual claims*, the parties may still be able to settle the case without outside assistance if their counsel are able to develop a cooperative relationship. . . . [t]he parties may identify those entitled to relief by assessing the nature and effect of the allegedly discriminatory practices and applying that assessment to the facts of the individual cases. This process would involve establishing criteria for determining whether a member of the affected class would have received the relevant employment benefit absent the challenged practices.

Brief of the United States as *Amicus Curiae* in 84-1999 at 29, 30. (Emphasis added).

The United States' "formula" approach is both self-contradictory and unworkable. The government first suggests that parties may settle a Title VII action without making "judgments about the facts relating to individual claims." Yet, how can such judgments be avoided if the parties must determine "whether any member of the class would have received the employment benefit" absent discrimination? Once the criteria for the formula are determined, each individual case would necessarily require examination to determine the presence of each criterion. Unless a formula includes criteria such as the individual's qualifications, as well as his relative qualifications as compared to all other persons (minorities and non-minorities alike) who received or *might* have received the job in question, any formula that attempts to determine "whether a mem-

ber of the affected class would have received the relative employment benefit" could not possibly accomplish its stated purpose. If any lesser formula is acceptable, then so should be the race-conscious remedies in the cases now before this Court, as neither *assures* that the remedy is victim-specific. To assure victim-specificity, the parties cannot avoid considering whether the individual was qualified for a job as well as more qualified than other individuals who would have been considered for the job, absent discrimination.

Evaluation of relative qualifications automatically converts a "settlement" into a series of mini-trials over individual claims, at which not only would the merits of the individual's claim be tried but, most assuredly, claims of intervening "affected" employees. In the case of a municipality or other large employer, especially where the discrimination pervades all aspects of employment, including recruitment, hiring and promotions, the numbers of persons who *might* have been hired or promoted in the absence of discrimination could easily number in the thousands. For example, in the nationwide steel consent decree, it was conservatively estimated that individual determinations by a special master for the 60,000 claimants, with each person's case taking one hour to resolve, would require 28 years. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 851 n. 28 (5th Cir. 1975). Of course, one hour per case is grossly inadequate, considering the time needed to investigate and review qualifications of each claimant and other matters, such as what make whole relief is appropriate for him, and considering the likelihood of intervention by other employees.

The United States, perceiving the devastating impact upon affirmative action of any requirement to identify actual victims, argued to this Court in 1979:

And even if some mechanism could be devised for identifying victims in the course of voluntary compliance efforts, the cost and delay of that effort would be prohibitive.

U.S.A./E.E.O.C. *Weber* brief at 53.

If Title VII is interpreted to impose the same limitations on remedies in every case, whether settled or litigated, and if that limitation is the identification of actual victims, then settling parties would be compelled to guard against threat of collateral attack by either (a) incorporating elaborate procedures to identify, with complete assurance, the actual victims and to determine their individual relief, or (b) securing the consent of all intervenors and *potentially affected* third parties. The first alternative is a "settlement" that is just as time-consuming, expensive and burdensome as a trial. What would be the employer's motivation to admit liability or the employees' motivation to accept anything less than full backpay if they are required to present full proof of the extent of their individual injury?

The second alternative, negotiating a settlement among the plaintiff, defendant and all potentially affected third parties, is no alternative at all. It would be impossible to identify all potentially affected third parties, not to mention to secure their consent. Yet, no employer would enter into a consent decree if the decree were open to collateral attack from third parties who could invalidate the decree by showing that some of the persons identified were not actual victims of discrimination.

B. *Race-Conscious Remedies That Are Not Victim-Specific Are Fair*

Race-conscious remedies of the kind challenged by petitioners are not unfair to members of the historically favored race. Since race-conscious remedies are imposed to eradicate the effects of historical discrimination, such remedies will not unfairly injure third parties if the remedies are carefully constructed to integrate the disadvantaged class into the workforce to the degree that would have occurred absent discrimination. In many situations, one possible measure of the degree of minority participation in a non-discriminatory environment is the percentage of minorities in the community's labor force. When a white employee has *benefited* by the discrimination, it is not

unfair to retard his future promotions to make way for blacks or women as long as the *number* of blacks or women hired does not exceed the relative *number* of blacks or women that would have been hired absent discrimination. The impact on the favored class members is the same whether the proven victims receive their rightful places or whether the same number of persons (potential though not proven victims) occupy those places.⁸

Accordingly, any concern that employers will bargain away rights of non-minority employees to avoid the expense of litigation is unwarranted. As long as the district court has the responsibility to assure that the numerical impact of the decree's affirmative action provisions approximates the impact that non-discrimination would have had upon the favored class, then non-minorities will not be injured. Moreover, in considering the fairness of any class action settlement, the district court should evaluate the fairness of the proposed settlement upon class members as well as upon employees who may be affected by the settlement. In evaluating whether settlement is fair and adequate, the district court should apply this Court's guidelines for voluntary affirmative action as discussed in *Weber*. This approach is neither novel, unmanageable, nor impracticable. It is the very approach followed routinely by district courts in approving consent decrees, including the district court in Birmingham's Title VII litigation, and by appellate courts in reviewing the appropriateness of race-conscious remedies whether imposed by consent decree or otherwise.

⁸This argument was presented to this Court by the government in 1979 in its defense of voluntary affirmative action and applies equally to affirmative action incorporated in a court decree:

Nor would the interests of white employees have been materially advanced if participation in the training program had been premised on the identification of particular blacks and women who had been victims of prior discrimination. The incumbent employees would be affected similarly by a remedy in favor of identifiable victims of specific discrimination as by a remedy that approximates that result by instead including a specified proportion of minority employees not so identified.

U.S.A./E.E.O.C. *Weber* brief at 53.

Thus, the legitimate interests of non-minorities are protected by the court when it considers whether race-conscious remedies are necessary and appropriate. Relevant to this determination is whether the relief is temporary and terminates when manifest racial imbalances are eliminated, whether there is evidence of historical discrimination, whether the discrimination was intentional, whether the relief does not unnecessarily trammel interests of whites by effectively barring their advancement or requiring their discharge and replacement with blacks, and whether beneficiaries of the relief are qualified for any employment opportunity conferred. See *Weber*, 443 U.S. at 208; *Paradise*, *supra*, 767 F.2d at 1527-34.

These considerations are entirely consistent with this Court's decision in *Stotts*, where the court-imposed layoff remedy unnecessarily trammelled rights of whites because it required discharge of whites, in contravention of a *bona fide* seniority system. The circumstances presented in *Stotts*, however, should constitute the only exception to the lawfulness of court-ordered race-conscious remedies that fail to identify specific victims. Absent a *bona fide* seniority system, Title VII does not guarantee non-minority employees protection against layoffs or preferential consideration in promotions. The absence of such guarantees, however, does not unfairly injure a non-minority as long as any advantages accorded to minorities pursuant to consent decree or other court order are appropriate to remedy past discrimination.

An employer's self-interest in limiting litigation costs by entering into consent decrees, therefore, does not threaten legitimate interests of incumbent employees. This Court's prior decisions in *Weber* and *Stotts* and the lower courts' role in assuring that race-conscious remedies comport with those decisions provide genuine protection to incumbent employees. Moreover, the employer's cost-consciousness is by no means an improper motivation for settlement. When the fact of discrimination is not a debatable matter, protracted litigation only perpetuates the discrimination, further entrenches its effects, delays relief to plaintiffs, and consumes financial resources that

might otherwise be utilized to meet municipal obligations.

Birmingham readily admits that one of its incentives to enter into its consent decree was to avoid further protraction of litigation which was in its seventh year and had cost tens of thousands of dollars, yet was guaranteed to last many more years and cost thousands of more dollars before all issues covering all City departments were finally tried. That seemingly interminable litigation would have been successfully terminated by the 1981 consent decree had it not been for the irresponsible reading, by the government and by some reverse discrimination plaintiffs, of this Court's decision in *Stotts*. In the eighteen months since *Stotts* was decided, Birmingham has expended hundreds of thousands of dollars defending — from governmental and private challenge — the very remedies sought by the government and carefully approved by the Court in 1981.

We cannot believe that this Court intended *Stotts* to cause such wasteful litigation, to erect such a barrier to settlement, or to deprive the lower courts of such a valuable tool to remedy effects of past discrimination regardless of the case's circumstances. Remarkably, the need for clarification of this Court's ruling in *Stotts* is not due to any conflict among the lower courts. Rather, clarification is needed to resolve a conflict between the lower courts, on the one hand, and the United States and private parties, on the other hand. The important factual differences between *Stotts* and the cases *sub judice* and the well-reasoned decisions below demonstrate that race-conscious remedies that are not confined to proven victims are necessary and appropriate in many cases. This Court should not extend its holding in *Stotts* to these cases. By affirming the decisions below, this Court would preserve a necessary and lawful remedy under Title VII and the Fourteenth Amendments which courts have used successfully for many years.

CONCLUSION

For the reasons stated, the judgments of the Courts of Appeals should be affirmed.

James K. Baker
Counsel of Record
City Attorney
CITY OF BIRMINGHAM
600 City Hall
Birmingham, AL 35203
(205) 254-2372

James P. Alexander
Linda A. Friedman
Gregory H. Hawley
BRADLEY, ARANT,
ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

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BRIEF

JAN 24 1986

JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, *et al.*,

Petitioners,

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,

Respondents.

LOCAL NUMBER 93, INTERNATIONAL
ASSOCIATION OF FIREFIGHTERS, *etc.*,

Petitioner,

—v.—

CITY OF CLEVELAND, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND AND SIXTH CIRCUITS

BRIEF AMICI CURIAE

For NOW Legal Defense and Education Fund; California Women
Lawyers; Employment Law Center; Equal Rights Advocates; League
of Women Voters of the United States; National Women's Law
Center; Northwest Women's Law Center; Wider Opportunities for
Women; Women Employed; Women's Law Fund; Women's Law
Project; National Bar Association, Women Lawyer's Division,
Greater Washington Area Chapter; Women's Legal Defense Fund

IN SUPPORT OF RESPONDENTS

MARSHA LEVICK

EMILY J. SPITZER

(Counsel of Record)

SALLY GOLDFARB

NOW Legal Defense and
Education Fund

99 Hudson Street

New York, New York 10013

(212) 925-6635

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INTERESTS OF AMICI CURIAE*

The NOW Legal Defense and Education Fund and other Amici are organizations dedicated to securing equal rights for women before the law.**

STATEMENT OF THE CASES

Amici adopt the two Statements of the Case as set forth by the respondents in the instant cases.

SUMMARY OF ARGUMENT

Title VII permits and contemplates race-conscious relief, which is of vital importance in tackling the dual problems of individual prejudice and systemic discrimination against minorities and women in employment. The language of Title VII read as a whole, the legislative history of the statute, Supreme Court precedent and over

* Letters of the parties reflecting their consent to the filing of this brief are being filed with the Court.

**Descriptions of these organizations appear in the Appendix to this brief.

twenty years of lower court decisions all support this position. Petitioners' argument that race-conscious, class-based relief violates Title VII is based on a faulty reading of selected extracts from the legislative history and from Supreme Court cases.

Nor does race-conscious relief violate the 14th Amendment to the United States Constitution. Analysis of the opinions of the Justices of this Court in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978), Fullilove v. Klutznik, 448 U.S. 448 (1980), and a series of school desegregation cases, reveals that the Constitution permits such relief, and that such relief is crucial for ending discrimination.

The importance of race-conscious relief is highlighted by an examination of the position of women in the

workforce. While women have made substantial gains, they are still overrepresented among the poor and in low-paying jobs. Recent studies show that race and sex-conscious affirmative action has a positive impact on female and minority employment. The fashioning of the most complete relief possible under Title VII, including race and sex-conscious relief, must be continued and encouraged.

ARGUMENT

- I. TITLE VII IS A BROAD REMEDIAL STATUTE WHICH PERMITS BOTH MAKE-WHOLE RELIEF TO IDENTIFIED VICTIMS OF DISCRIMINATION AND AFFIRMATIVE RACE-CONSCIOUS RELIEF TO REMEDY CLASS-BASED DISCRIMINATION.

The instant cases present squarely the question whether Title VII permits race-conscious relief. Petitioners and the United States as amicus curiae argue that relief under Title VII may never take race into account; rather, they urge it must be

color-blind and restricted to making whole identified victims of discrimination. This argument is without merit, and conflicts not only with the language and legislative history of Title VII, but also with over twenty years of interpretation of Title VII by this Court and the lower federal courts.

- A. Sections 703(j) and 706(g), Read Together, Permit Race-Conscious Relief To Remedy Violations Of Title VII.

Title VII was enacted as a broad remedial statute intended to provide far-reaching relief from discrimination, and to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."¹ The Act tackles the dual problems of individual prejudice and institutionalized systemic

¹ 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).

discrimination against minorities and women.² As established by this Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), Title VII was intended to provide both affirmative class-based relief and individual make-whole relief:

As the Court observed in Griggs v. Duke Power Co., 401 U.S. at

² In 1972, during the debate on the 1972 amendments to Title VII, Senator Moss acknowledged the breadth of discrimination against women, minorities, and other protected classes:

We have discovered that the promises in the 1964 Civil Rights Act were just a beginning... We have learned since that date that job discrimination is more pervasive and subtle than we supposed; an examination of the discussion in 1964 reveals that we were naive about such discrimination, thinking that voluntary compliance and conciliation would be enough to stop the prejudicial activities of most, and that those who blatantly and defiantly excluded others from the opportunity to work would be stopped by court action. We now know that the problem is much deeper.

Legislative History of the Equal Employment Opportunity Act of 1972, p. 1554.

429-430, the primary objective was a prophylactic one: 'It was to achieve equality of opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.'..It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.

422 U.S. at 417-18 (emphasis added).

The text of Title VII itself underscores this dual purpose. The statutory sections governing liability and relief, particularly §§ 703(j) and 706(g), contemplate the use of race in fashioning remedies for illegal discrimination.

Section 706(g), the remedial section of the Act, provides in part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of

employees, with or without backpay . . . or any other equitable relief as the court deems appropriate. . . .

The section thus leaves the precise method of remedying discrimination largely up to the broad discretion of the district court, which is free to tailor relief to fit the specific discriminatory practice.³

³ Thus, employment goals have been expressed in terms of specific numbers or ratios, United States v. Wood, Wire and Metal Lathers Int'l Union, Local 46, 471 F. 2d 408, 412-13 (2d Cir.), cert. denied, 412 U.S. 939 (1973) (minimum of 100 work permits to be issued to non-whites; 250 permits to be issued annually on a "one-to-one" basis, black to white, through 1975); Plans may be very detailed, Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975) (program of race-conscious relief which involved pooling of minorities and non-minorities in four separate groups, with hiring on a one-to-one basis from the first two groups until the minority group was exhausted, followed by hiring from the other two groups until local fire departments attained sufficient minority fire fighters to have a percentage of the force approximately equal to the percentage of minorities in the locality). Alternatively, the precise details may be left very vague, Chisholm v. United States Postal Service, 665 F.2d 482, 498-99 (4th

The only limitation on the power of a court to order relief is articulated in the final sentence of § 706(g) and pertains solely to make-whole relief:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee... if such individual was refused admission, suspended or expelled, or... discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a) (emphasis added).

42 U.S.C. § 2000e - 5(g) (1978). Petitioners contend that this sentence bars remedial race-conscious relief. However, the language itself of the sentence reflects that the Congress was only imposing a limitation on make-whole relief to individuals, and was not in any way

Cir. 1981) (U.S.P.S. ordered to make "affirmative efforts" to recruit, appoint and promote qualified black persons, using as its goal the percentage of black persons in the Charlotte U.S.P.S. work force).

circumscribing race-conscious relief which is class based. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984) ("Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination." 81 L.Ed.2d 483, 497 n.9 [emphasis added].)

Moreover, the expansive language of the first sentence of § 706(g), read in conjunction with section 703(j) of the Act, reflects that race-conscious action is contemplated. Section 703(j) provides:

[n]othing contained in this title shall be interpreted to require any employer...subject to this title to grant preferential treatment to any individual or to any group because of

the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2 (1978).

Section 703(j) concerns liability under the Act. It provides that an employer will not be liable under Title VII merely because a racial imbalance, without more, exists among his or her employees.

Petitioners nevertheless erroneously contend that § 703(j) is a limitation upon the remedies which a court may award pursuant to § 706(g). The legislative

history of the section belies that interpretation.⁴

The original version of Title VII passed by the House of Representatives contained no provision like § 703(j). Opponents of the bill argued that, in the absence of a definition of the word "discrimination", federal agencies and courts would equate "discrimination" with "racial imbalance". For example, opponents on the Judiciary Committee produced a Minority Report which noted that the word "discrimination" was nowhere defined and charged that the absence of any reference to "racial imbalance" was a "public relations" ruse and that "the administration intends to rely upon its own construc-

⁴ Amicus Curiae United States, filing on behalf of Petitioners, readily concedes, that 703(j) applies only to liability and not to remedies. Brief of the United States in connection with the Local 93 case at p.13.

tion of 'discrimination' as including the lack of racial balance...." HR Rep. No. 914, 88th Cong. 1st Sess., pt. 1, pp. 67-68 (1963). Those opponents feared that Title VII would be used to force employers to maintain in every job a specific proportion of minorities or women, even in the absence of any past discriminatory practices.

Supporters of Title VII responded that race-conscious action could not be required in the absence of past discrimination. The following colloquy took place between Senators Robertson and Humphrey:

Senator Robertson: It is contemplated by this title that the percentage of colored and white population in a community shall be in similar percentages in every business establishment that employs over 25 persons...

Senator Humphrey: The bill does not require that at all... There is no percentage quota.

110 Cong. Rec. 5092 (1964).

Senator Humphrey's remark should not be taken out of context, however. It does not prove, as Petitioners and the United States assert, that race-conscious action was opposed in all circumstances. Rather, it is part of a debate concerning preferential treatment as a remedy for racial imbalance alone.

The dispute was finally resolved by the introduction of a substitute bill, the "Dirksen-Mansfield" amendment, on May 26, 1964. This bill contained § 703(j) which "apparently calmed the fears of most of the opponents; after its introduction, complaints concerning racial balance and preferential treatment died down considerably." United Steelworkers v. Weber, 443 U.S. 193, 247 (1979) (Rehnquist, J. dissenting).

Section 703(j) thus does not prohibit remedial race-conscious affirmative relief;

its focus is on liability rather than permissible remedies. Courts are not, however, precluded from considering racial imbalance as evidence of a Title VII violation,⁵ and once a finding is made that certain unlawful employment practices have caused a numerical racial imbalance, a court may order relief pursuant to § 706(g). Thus, to paraphrase § 703(j), while an employer may not be required to grant preferential treatment to any group on the basis of race simply because there is a racial imbalance between workplace and community, if discrimination is established, the broad equitable remedies provided by § 706(g) may be ordered, including the preferential treatment for particular groups to which § 703(j) refers.

⁵ See Teamsters v. United States, 431 U.S. 324, 339-40, n.20 (1977).

Indeed, as this Court pointed out in United Steelworkers v. Weber, 443 U.S. 193, 206 (1979), had Congress meant to prohibit all race-conscious affirmative action, it could easily have changed the wording (and thus the focus) of § 703(j) to "nothing in Title VII shall be interpreted to permit" race-conscious action. In a similar vein, Congress could also have expressly limited § 706(g), instead of furnishing the courts with such broad equitable authority. By the broad wording of § 706(g), courts are empowered to order and approve "appropriate" affirmative action, which "may include, but is not limited to ... hiring of employees ... or any other equitable relief as the court deems appropriate,"⁶ as well as make-whole relief

⁶ By 1972 at least four circuits had ruled that Title VII remedies were not restricted to make-whole relief for individual victims of discrimination, and

that a rejection of affirmative action remedies involving goals and timetables "would allow complete nullification of the stated purposes" of the Civil Rights Act of 1964. United States v. IBEW, Local 384, 428 F.2d 144, 149-51 (6th Cir.), cert. denied 400 U.S. 943 (1970). See also, United States v. Ironworkers, Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

The words "or any other equitable relief" were added to § 706(g) in 1972 with the intention that: "[t]he provisions of this subsection are intended to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible." (emphasis added). Subcommittee on Labor, 92 Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, 1773-74, 1838-39 (Comm. Print 1972). Congress knew that the courts sanctioned race-conscious class-based prospective relief.

The full text of two cases in which such remedies were approved was placed in the Congressional Record by Senator Javits: United States v. Ironworkers Local No. 86, 428 F. 2d at 144; Contractors Association of Eastern Pennsylvania v. Secretary of Labor 442 F.2d 159 (3rd Cir.), cert. denied, 404 U.S. 854 (1971); 118 Cong. Rec. 1765 (1971).

Moreover, Congress explicitly con-

for individual victims of discrimination such as reinstatement and back pay. The former relief must include race-conscious relief if the goals of the Civil Rights Act - among them "the integration of blacks into the mainstream of American society," Weber, 443 U.S. at 202 - are to be achieved.

sidered and rejected proposals to alter the prevailing judicial interpretations of Title VII as permitting, and in some circumstances, requiring race-conscious relief.

In any area where the new law does not address itself, or in any areas where specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Legislative History of the Equal Employment Opportunity Act of 1972, p. 1844. (Comm.-Print 1972). See generally Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 Cin. L. Rev. 723, 747-57 (1972).

B. Prior Precedent Of This Court Establishes That Race-Conscious Relief Is Permitted Under Title VII.

In both University of California Regents v. Bakke, 438 U.S. 265 (1978), and United Steelworkers v. Weber, 443 U.S. 193 (1979), a majority of this Court agreed that, to remedy the effects of past discrimination, relief that favored groups previously discriminated against may be appropriate under the Civil Rights Act in general, and Title VII in particular.⁷

⁷ Petitioners' reliance on Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983), and Connecticut v. Teal, 457 U.S. 440 (1982) for the principle that Title VII does not permit prospective race-conscious relief is misplaced.

In Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), this Court held that an employer may not discriminate in providing pension benefits to male and female employees on the basis of generalizations about the average woman and the average man. The Court stated that Title VII prohibits employment decisions premised on stereotyped assumptions. 435 U.S. at

707-11. In stating that "[t]he statute's focus on the individual is unambiguous" and that Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class," this Court in Manhart addressed whether Title VII permits an employer to limit opportunities for employment or employment benefits on the basis of stereotypes about the characteristics of a class. 435 U.S. at 708.

The emphasis in Manhart on protecting the individual from descriptive generalizations about the individual's class is not relevant to a consideration of race-conscious relief, which does not entail any stereotypes of an empirical nature about the qualifications or other factual characteristics of whites or blacks. The only factual assumption underlying prospective race-conscious relief is the finding that the employer has discriminated. Both qualified whites and qualified nonwhites are eligible for employment, promotion, and related benefits under the affirmative action plans challenged in both of the present cases. Race is not used as a proxy for any other characteristic, whereas Manhart concerned the use of sex as a proxy for longevity.

Petitioners also erroneously rely upon Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983). Justice Marshall's opinion in that case drew heavily on the Court's reasoning in Manhart. In Norris, the issue was the permissibility under Title VII of conditioning employee benefits on factual generalizations about the

In Bakke, the Court analyzed the "special admissions program" of the University of California at Davis Medical School which provided that 16 places at the school were to be reserved for qualified black students. Whether this limitation was "described as a quota or a goal", it was "undeniably a classification based on race and ethnic background". 438 U.S. at 289. While four members of the

characteristics of the class to which an individual belongs. 463 U.S. at 1079-86. Norris, like Manhart, does not control the cases now before the Court.

Connecticut v. Teal, 457 U.S. 440 (1982), is similarly inapposite. That case concerned whether an individual victim of race discrimination was protected by Title VII despite the presence of large numbers of members of that person's race in the work force. This Court answered that question in the affirmative, rejecting the so-called "bottom line" defense. The Court's opinion, written by Justice Brennan, must be read in the context of the question then before the court, and does not apply to a race-conscious plan devised as a remedy for proven prior discrimination.

Court⁸ held that "whether race can ever be used as a factor in an admissions decision is not at issue in this case", id. at 411, the other five, Justices Powell, White, Brennan, Marshall and Blackmun (the "majority") held that race could be taken into account in certain circumstances. As the latter four justices stressed in their opinion, the "central meaning" of the Court's different opinions was that:

[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least where appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Id. at 325. Their opinion, which stressed that Title VI permitted race-conscious action to the extent that it was permitted

⁸ Stevens, Stewart, Rehnquist, J.J., Burger, C.J.

by the Constitution, accepted that "racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions." Id. at 362. Justice Blackmun restated this principle forcefully in his own separate opinion:

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.

Id. at 407.

While the Court's primary focus was on Title VI and the Constitution, references to Title VII in the opinions reflect that the Court recognized that racial preferences were permissible remedies under Title VII. Justice Powell, noting that

"[t]he state certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination", id. at 307, observed that "Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications." Id. at 308, n. 44. (Emphasis added). Justices White, Brennan, Marshall and Blackmun wrote that:

[t]his Court has construed Title VII as requiring the use of racial preferences for the purpose of hiring and advancing those who have been adversely affected by past discriminatory employment practices, even at the expense of other employees innocent of discrimination.

Id. at 340-41, n.17. (Emphasis added).

In United Steelworkers v. Weber, the

majority⁹ held that Title VII should not be interpreted to condemn a private, voluntary, race-conscious affirmative action plan which reserved for black employees 50% of the openings in a craft-training program until the percentage of black craftworkers in the plant equaled their representation in the local labor force. While the Court stated that the decision did not pertain to what a court might order to remedy a violation of the Act, it did state that:

an interpretation of [§§ 703(a) and (d)] that forbade all race conscious affirmative action would "bring about an end completely at variance with the purpose of the statute and must be rejected."

443 U.S. at 202 [citation omitted].

The Court stated further:

⁹ The majority included Justices Brennan, Stewart, White, Marshall and Blackmun. Justices Powell and Stevens took no part in the consideration or decision.

It would be ironic indeed if a law triggered by a nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long"... constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. at 204 (citation omitted).

Petitioners' and the United States' argument that a race-conscious remedy is not permissible as part of a consent decree or court order under Title VII where there has been a finding of discrimination is logically inconsistent with the Weber ruling. Not only does the argument ignore the plain words of Weber but also it posits a situation in which actual violators of Title VII would be expressly forbidden from fully rectifying the effects of their discriminatory actions, while well-meaning employers who may have committed no Title

VII violation would be encouraged and allowed to engage in race-conscious employment practices. Neither this Court, nor Congress, could have intended such an inconsistent result.

Petitioners erroneously rely on this Court's ruling in Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984) to support their position.¹⁰ At issue in Stotts was the legality of an injunction issued by the district court, and upheld by the Court of Appeals, which prevented the firing of employees by the Memphis Fire Department on a "last hired, first fired" basis. The district court found that the proposed layoffs would have a racially discriminatory effect and would undermine the progress made in integrating

¹⁰ See Brief of Petitioner Local 28 at p. 17, Brief of Petitioner Local Number 93 at p. 19; see also Brief for the United States as Amicus Curiae at p.13.

the fire department by a consent decree which provided for race-conscious hiring policies. In striking down the injunction, this Court purposely confined its decision to the question of make-whole relief for actual discriminatees, and thus to an analysis of the final sentence of § 706(g) which refers only to relief for individuals rather than classes.¹¹ The majority concluded that the final sentence of § 706(g) authorizes a Court "to provide make whole relief only to those who have been actual victims of illegal discrimination. . ." Stotts, 104 S.Ct. at 2589. (Emphasis added) In the cases sub judice, which do not involve make-whole relief, the statute's limitation of such relief "only to... actual victims of discrimination" is irrelevant.

¹¹ See supra, p. 8.

Furthermore, the disagreement between the majority and the dissent in Stotts regarding the proper characterization of the relief awarded by the district court as prospective or make-whole relief underscores the narrow scope of the prohibition contained in § 706(g). The majority viewed the injunction against minority layoffs as individual awards of retroactive seniority and hence make-whole relief to specific members of the class, governed by the final sentence of section 706(g). The dissent viewed the injunction as prospective race-conscious relief, since the city remained free to lay off any individual black as long as a certain overall percentage remained on the force. Id. at 2606.

Moreover had the majority really intended to condemn class-based, race-conscious relief, it would surely have questioned the validity of the underlying

consent decree which included hiring and promotion goals to redress past discrimination in the Fire Department. However, the legality of the decree, which was analyzed extensively and upheld by the Sixth Circuit was not commented on by this Court. See Stotts, 679 F.2d 541 (6th Cir. 1982).¹²

¹² Stotts must also be distinguished from the instant cases by its narrow focus on the issue of abrogation of seniority rights. Neither of these cases involves any abrogation of seniority rights. See Vanguards of Cleveland v. City of Cleveland, et al. 735 F. 2d 479, 486 (1985); E.E.O.C. v Local 638...Local 28 of Sheet-metal Workers, 735 F. 2d 1172, 1186 (1985). In Stotts, the Court analyzed the relationship of section 703(h) and section 706(g). It concluded that section 703(h) protects bona fide seniority systems which are not adopted with discriminatory intent, even when they have a discriminatory impact on a minority group. Section 703(h) like section 703(j), thus speaks only to substantive liability. The Court went on to say, however, that this protection was not total; on the facts in Stotts non-minority employees with seniority could be displaced by minority employees, where grants of retroactive seniority would be appropriate to make whole individuals who

Petitioners' reliance on Teamsters v. United States, 431 U.S. 324 (1977) is similarly misplaced. Teamsters, like Stotts, involved the interrelation of seniority and make whole relief for individual victims of discrimination. Minority drivers, discriminated against prior to the effective date of Title VII by being excluded from the "line driver" position, found that on transfer to those positions the company's seniority plan limited competitive seniority to the length of time an employee had been a line driver at a particular terminal.

could prove that there was a discriminatory reason for them personally being the last hired. 104 S. Ct. at, ___, n. 9, ___, 81 L.Ed. 2d 483, 497; O'Connor, J. concurring at ___, 81 L. Ed 2d 483, 505. The Court's discussion of section 706(g) thus concentrated on proof of individual discrimination in the context of a bona fide seniority system.

However, while forbidding retroactive seniority to anyone other than actual discriminatees, the Court noted without disapproval that the company had entered into a consent decree providing that, once the injury to the individual victims of discrimination had been remedied, it would fill future vacancies at its terminals by hiring one Negro or Spanish-surnamed person for every white person until the percentage of minority group workers at the terminal equaled the percentage of minority group members in the population of the metropolitan area surrounding the terminal. 431 U.S. at 330, n. 4. The Court went on to note that "[t]he federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers . . . eliminate their discriminatory practices and the effects there-

from In this case prospective relief was incorporated in the parties' consent decree." Id. at 361, n.47. (emphasis added)¹³ The foregoing demonstrates that Title VII both permits and contemplates race-conscious class-based relief.

¹³ For over twenty years, the lower federal courts have also interpreted Title VII as providing the courts with broad equitable authority to design race-conscious action to eliminate the vestiges of past discrimination. See, e.g., Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027-1028 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974); E.E.O.C. v. American Tel. & Tel. Co., 556 F.2d 167, 174-77 (3rd Cir. 1984), cert. denied, 438 U.S. 915 (1977); Chisholm v. United States Postal Service, 665 F.2d 482, 499 (4th Cir. 1981); United States v. City of Alexandria, 614 F.2d 1358, 1362-66 (5th Cir. 1980); United States v. City of Chicago, 663 F.2d 1354, 1356 (7th Cir. 1981) (en banc); Firefighters Institute v. City of St. Louis, 616 F.2d 350, 364 (8th Cir. 1980), cert. denied, 452 U.S. 938 (1981); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 944 (10th Cir. 1979); Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. 1982).

II. CLASS-BASED RACE CONSCIOUS RELIEF IS CONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT

Petitioner Sheet Metal Workers Union urges that the class based, race-conscious relief ordered herein to remedy the years of intentional discrimination practiced by the Union violates the equal protection clause of the Fourteenth Amendment. The Union urges, inter alia, that because the remedial plan at issue benefits more than individual identifiable victims of discrimination, it is unconstitutional. (Pet.-brief, p. 30) The Union's view, however, ignores the teachings of this Court and is nothing more than a thinly veiled attempt by the Union to perpetuate the intentional discrimination in which it has continued to engage. As Justice Blackmun stated in University of California Regents v. Bakke, 438 U.S. 265 (1978) [Bakke], "We cannot -- we dare not -- let the Equal Protection

Clause perpetrate racial supremacy." 438 U.S. at 407. An analysis of this Court's opinions in this area reveals not only that race-conscious remedies are constitutional but also that this Court considers them crucial for the purpose of ending discrimination.

In Bakke, as in Fullilove v. Klutznick, 448 U.S. 448 (1980) [Fullilove], this Court examined race-conscious affirmative action plans for their adherence to Fifth and Fourteenth Amendment principles. In Bakke, the University of California's "special admissions program" was scrutinized, while the "Minority Business Enterprise" ("MBE") provision of the Public Works Employment Act (§ 103(f)(2)) was examined in Fullilove. In both cases the programs were introduced in order to remedy what was perceived as significant underrepresentation of minorities in particular

fields of endeavor. Neither plan required that an individual, to qualify for the benefits of the program, demonstrate that he or she had been individually discriminated against by the medical school or the public works project to which application was made.

While this Court was unable to agree on a majority opinion in either case, it did recognize that under certain circumstances remedial race-conscious relief is justified. In separate opinions, the Justices articulated individual standards of scrutiny for determining when race-conscious remedies may be deemed appropriate.¹⁴

¹⁴ Justices Stevens, Burger, Stewart and Rehnquist did not reach the constitutional issue in Bakke and decided the case instead by reference to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. They did, however, offer some guidance in Fullilove. See discussion infra.

Justice Powell, in his opinions,¹⁵ advocated strict scrutiny toward race-conscious plans. He cautioned that a race-conscious remedy would not be considered "compelling" unless the "appropriate" governmental authority determined that a constitutional or statutory violation had occurred, there existed some illegal discrimination in the past which justified a remedy at present, and the method selected to achieve the legitimate goal of addressing and eradicating identifiable past discrimination be "narrowly drawn" to fulfill the governmental purpose, although the method need not be "limited to the least restrictive means of implementation." Fullilove, 448 U.S. at 498.

¹⁵ Justice Powell wrote for the Court in Bakke by virtue of his swing vote and offered his own separate opinion applying his Bakke method of analysis in Fullilove.

While Justice Powell had reservations about race-conscious remedies, he clearly appreciated their necessity: "The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin.-

But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination." Id. at 516.

In their joint separate opinions, Justices Brennan, Marshall and Blackmun¹⁶ interpreted the equal protection clause to permit an even wider range of race-conscious relief for the benefit of historic victims of discrimination. They

¹⁶ Justice White also joined with these justices in their Bakke opinion, but joined with Chief Justice Burger in Fullilove.

employed an "intermediate"¹⁷ rather than "strict" standard of scrutiny to review such action, and readily accepted the proposition that the Constitution need not be color blind. Bakke, 438 U.S. at 336.¹⁸ The Justices held that an articulated purpose of remedying the effects of past discrimination was a sufficiently important interest to justify the use of racial classifications. Id. at 520; Bakke, 438 U.S. at 362.¹⁹

¹⁷ This intermediate standard of scrutiny had been used in sex discrimination cases. See e.g. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

¹⁸ The Justices noted in Fullilove that their analysis in the Fifth Amendment area was the same as that under the Fourteenth Amendment. 448 U.S. at 517, n.2, quoting Bakke, 438 U.S. at 367, n.43.

¹⁹ The Justices further recognized that the very principles which outlawed the "irrelevant or pernicious use of race were inapposite to racial classifications that provide benefits to minorities for the purpose remedying the present effects of

The legitimacy of race-conscious relief was also acknowledged by Chief Justice Burger and Justice White in their joint opinion in Fullilove.²⁰ The Justices recognized the need for "careful judicial evaluation" to assure that any program employing racial or ethnic criteria to remedy the present effects of past discrimination is "narrowly tailored to the achievement of that goal." 448 U.S. at 480.²¹

past discrimination." 448 U.S. at 518.

²⁰ Justice Powell joined in this opinion in addition to his own separate opinion.

²¹ The Justices' analysis proceeded primarily in three steps. At the outset, they determined that the goals of the plan be legitimate. They determined further that the objectives must be within the powers of Congress as the governmental body which drafted the legislation. Their final inquiry concerned whether a limited use of racial and ethnic criteria could be a constitutionally permissible means for achieving legislative objectives in light of the equal protection component of the

In accordance with the views of their colleagues, Justices Burger and White generally accepted the concept that in a "remedial context", a governmental body need not be oblivious to race in fashioning a remedy. Id. at 482. The failure of non-minority firms to receive certain contracts was viewed as an incidental consequence of the program: "such a sharing of the burden" was not considered impermissible. Id. at 484, quoting Franks v. Bowman Transportation, 424 U.S. 747, 777 (1976).

The majority of the members of this Court thus have regarded race-conscious remedial plans as constitutional provided that they meet certain standards. The

due process clause of the Fifth Amendment (in the case of Federal legislation). 448 U.S. at 473. The Justices were particularly concerned that the means employed be "narrowly tailored" to achieve those objectives. Id. at 487, 490.

Court, in its various voices, has required: 1) that the body taking the action be competent to articulate and respond to the purpose served by the action; 2) that the governmental interest or objective at stake be important or compelling; 3) that the means adopted be substantially or closely tailored to serve the governmental purpose so as not to trammel unnecessarily the interests of innocent third parties; and 4) that the action stigmatize no one.²²

²² In neither Bakke nor Fullilove were there findings that the specific medical school or a specific public works project had discriminated against minorities. Nonetheless, a majority of this Court sanctioned race-conscious relief as enumerated supra. In Local 28 the facts as found by the district Court are far more egregious. As detailed in respondent's brief, and the brief of Amicus NAACP LDF, Local 28 itself engaged in intentional and systematic discrimination of the most repugnant sort. Thus, the justification for strong remedies in the instant case is particularly compelling.

Petitioner Sheet Metal Workers Union fails to analyze in any detail this Court's decisions which consider the constitutionality of race-conscious plans. Instead, petitioner merely states in a conclusory fashion that "this Court has not approved racial classifications unless (1) Congressional findings have been made that members of one group have suffered discrimination; (2) the legislation is tailored to benefit only the individual victims; and (3) although the statute may confer benefits unavailable to others, it does not trammel their fundamental rights. [Citation omitted; emphasis added.]" (Petitioner's Brief, p. 30).

Petitioner's conclusion that a race-conscious remedy must, inter alia, be tailored to benefit only individual victims is baffling, since the cases which analyze the constitutionality of affirmative relief

specifically say otherwise. Indeed, many of the Justices give strong endorsements to class-based, race-conscious relief which is not at all "victim specific."

The Public Works statute at issue in Fullilove which required that 10% of public works funds be set aside for minority business enterprises, did not require that only minority businesses which had been actual victims of discrimination could qualify for the set-aside. On the contrary, the only statutory limitation imposed on the set-aside was that it be granted to "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aliens." § 103(f)(2) of the Public Works Employment Act of 1977. Similarly, the regulations promulgated thereunder did not limit in any way the beneficiaries of the race-conscious plan to actual identifiable victims of

discrimination. The operative fact was membership in one of the protected groups.

Justices Burger, White and Powell, in upholding the constitutionality of the remedial plan in Fullilove, fully recognized that the plan did not contemplate conferring benefits only on identifiable victims of discrimination. They acknowledged that a business enterprise sufficiently composed of members of one of the enumerated ethnic groups qualified that business for remedial benefits. 448 U.S. at 458-59. Nowhere in their opinion did they suggest that the enterprise must have been the victim of discrimination to qualify for relief.

Nor did the Justices limit the relief available to make-whole relief. They specifically found that the set-aside in Fullilove which they approved was prospective in nature, stating that "[o]ur

review of the regulations and guidelines governing administration of the MBE provision reveals that Congress enacted the program as a strictly remedial measure; moreover, it is a remedy that functions prospectively, in the manner of an injunctive decree." 448 U.S. at 481.

Similarly, this Court in Bakke condoned race-conscious class-based relief, and specifically declined to limit such relief to identifiable victims. The majority of this Court in Bakke, inter alia, reversed the California Supreme Court's judgment which precluded the future consideration by the defendant of the race of applicants, holding instead that such consideration could be appropriate. This Court approved giving special consideration to all applicants who were members of a class that had suffered discrimination, regardless of whether or not the indi-

vidual was a specific victim of discrimination.

Justices Brennan, White, Marshall and Blackmun, in their joint opinion, made the race-conscious class-based nature of the relief clear:

Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. [citations omitted]. Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. (emphasis added).

Bakke, 438 U.S. at 363.

In light of the fact that this Court has approved race-conscious remedies, Petitioner's position that remedial plans

which consider race are unconstitutional is untenable. Furthermore, Petitioner's argument defies logic. An actual identified victim of discrimination who is granted a remedy is not granted a so-called race-conscious remedy. Rather, that individual is granted relief to remedy a wrong that has been inflicted specifically on him or her. The victim's race is not at issue in determining whether or not some remedy is appropriate. As has already been demonstrated, however, this Court has approved race-conscious remedies. Thus, this Court must necessarily have been sanctioning relief broader in scope than that which has traditionally been available to individual victims.

The school desegregation cases decided by this Court substantiate that class-based race-conscious relief is constitutional. In Green v. County School Board, 391

U.S. 430 (1968), a unanimous Court, rejecting as ineffectual a racially neutral "freedom-of-choice" school desegregation plan, ordered the school board to take immediate action to desegregate its two schools, a task impossible without attention to race. Three years later, in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), this Court again unanimously affirmed the power of the lower courts to order race conscious teacher and student assignments to integrate the schools in districts that had defaulted in their duty to build unitary systems. Swann further recognized that school authorities exercise broader powers than courts in devising desegregation plans and that they might legitimately decide "that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to White

students reflecting the proportion for the district as a whole." 402 U.S. at 16. This Court went on to hold in McDaniel v. Barr-esi, 402 U.S. 39 (1971), that school authorities could voluntarily desegregate their schools by drawing attendance zones so as to improve racial balance.

Taken together, these school desegregation cases stand for the proposition that courts, school boards and other arms of the government may, and in some circumstances must, make reference to race in remedying equal protection violations recognized by this Court. They further reflect that race-conscious remedies may not only be class-based but also prospective in nature.

Moreover, the remedial plans sanctioned in the school desegregation cases did not in any way limit the plans' benefits to students who were the indi-

vidual victims of discrimination, or who had previously attended segregated schools. Future as well as current entrants into the school system were beneficiaries of the plans. In every respect these plans conferred benefits upon classes of people, rather than upon individual victims of discrimination.

This Court's prior decisions make it irrefutable that race conscious relief afforded to classes of people, rather than only to individual victims, is constitutional. Thus, the argument of Petitioner Sheet Metal Workers Union must be rejected, and the opinion of the Second Circuit upheld.

III. THE HISTORIC AND CONTINUING LIMITATION OF WOMEN'S EMPLOYMENT OPPORTUNITIES REQUIRES AND JUSTIFIES RESORT TO CLASS-BASED REMEDIES

At issue in the instant cases is the validity of class-based race-conscious

remedies. The discrimination which minorities have historically suffered necessitates and justifies resort to such remedies. Women, particularly women of color, have likewise been denied equal rights and equal employment opportunities. Sex-based remedies have helped to rectify the problems faced by women, but far greater strides must be made. Unless this Court continues to sanction the use of class-based remedies, women, like minorities, will be denied equal employment opportunity. Bearing in mind the broad impact that this Court's decisions in the instant cases will have on women, a review of their economic and employment status will help put the issues presented in broader perspective.

A. Women of All Races Have Suffered Historic Discrimination in Employment and are Overrepresented in Low Paying Clerical and Semi-professional Jobs.

Discrimination against women in the workplace is not a new phenomenon. It is the product of a society that traditionally limited women to the role of homemaker and a legal system that maintained this exclusion by treating women as little more than appendages to their husbands.

Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., women's present employment opportunities are no longer legally restricted. But the underlying attitude that women do not "belong" in the workplace remains prevalent. Despite dramatic increases in their workforce participation, U.S. Department of Labor, Women's Bureau 20 Facts on Women Workers (1984) [hereinafter cited as 20 Facts] women have been far less successful in gaining entry to male-dominated professions. Thus clerical work

remains the largest occupation for women. U.S. Department of Labor, Women's Bureau, The United Nations Decade for Women, 1976-1985: Employment in the United States (July 1985) [hereinafter cited as Decade for Women]. While women have begun to make inroads into formerly male occupations,²³ they still represent only a tiny fraction of employees in traditionally "male jobs," which are usually better paid than traditionally female jobs.

Job segregation pervades all sectors

²³ By 1981 there were more than 802,000 women employed in the skilled trades, more than double the number in 1970 and almost four times the number in 1960. 20 Facts. Women have also made gains in other predominantly male professions, such as law, medicine and engineering. The category of bank officers and financial managers is the fastest growing managerial occupation for women. U.S. Department of Labor, Women's Bureau, Time of Change: 1983 Handbook on Women Workers (1983) [hereinafter cited as Time of Change].

of our economy, as is reflected by the following chart:

<u>Jobs</u>	<u>% Female</u>
Nurse	95.8
Kindergarten & Prekindergarten Teacher	98.2
Dental Hygienist	98.6
Secretaries	99.0
Child Care Workers	96.8
Cleaners & Servants	95.8
Receptionists	96.8
Construction Workers	7.0
Mechanical Engineers	2.8
Airplane Pilots & Navigators	2.1
Firefighters	1.0
Tool & Die Makers	1.2
Electricians	1.5
Brickmasons & Stone Masons	.3

Handbook of Labor Statistics, U.S. Dep. of Labor, Bureau of Labor Statistics (June 1985) [hereinafter cited as Handbook 1985]

The occupations involved in the instant cases well illustrate the problem. The sheetmetal workers profession ranks among the most sex-segregated industries. In 1972 only 0.7% of the sheetmetal workers and tinsmiths in the United States were women. Time of Change, p. 59. By 1981

that figure had risen only to 3.2%. Time of Change, p. 59. In 1983, women comprised a scant 4.5% of the sheetmetal workers labor force. Handbook 1985, p. 52.

In 1972 only 0.5% of the firefighters in the United States were women. Nine years later, in 1981, women had only made marginal gains, representing only 0.9% of the firefighter force. In 1983 the figure had risen to a mere 1.0%. Handbook 1985

Women will not achieve economic equality until job segregation is eliminated and women have equal access to all employment opportunities. Only with sex and race-conscious remedies will those goals be achieved.

For women of color, who suffer double discrimination based on sex and race or national origin, the problems of job segregation and low pay are especially pronounced. While historically women of

color, particularly black women, were a part of the paid labor force years before white women entered in any numbers, they have not reaped the benefits of their greater labor force participation.

As early as 1890, two out of five black women over the age of 10 were in nonfarm occupations. By 1950 black female participation in the labor market had increased to 46% and this figure rose to 49.5% in 1967 and to 53% in 1978. Julianne Malveaux, Low Wage Black Women: Occupational Descriptions, Strategies for Change, p. 4, January 1984.²⁴ By 1983 more than 70% of black women between the ages of 25 and 44 were workers. Low Wage Black Women, p. 5.

²⁴ Unpublished paper prepared for the NAACP Legal Defense and Education Fund, Inc. [hereinafter cited as Low Wage Black Women].

Notwithstanding their high labor force participation, black women also suffer, from occupational segregation and wage discrimination. Although black women are leaving the private household domestic service in which they have predominated in the past,²⁵ nearly 60% of all black women are employed in clerical and service occupations. Low Wage Black Women, p. 8. Even in traditionally female occupations, black women hold the lowest paying positions: welfare services aides, child care workers, and food counter workers. Low Wage Black Women, pp. 12-13.

²⁵ In 1980, 52% of black women worked in domestic and personal service occupations. By 1930, nearly two-thirds of black women workers performed domestic and personal service jobs. By 1940, 70% of all black women worked in domestic and personal service jobs, with about 60% working in private homes. By 1960 the proportion of black women in domestic jobs declined to 57%. Between 1960 and 1981, the proportion of black women domestic workers declined further. Low Wage Black Women.

Black women have begun to improve their employment status to some degree. Between 1970 and 1982, they increased their proportions in a number of professional and technical jobs, as accountants, nurses, dietitians and engineering and science technicians. Decade for Women. Black women have, however, made few inroads into traditionally male professional occupations: fewer than 2% of all attorneys are black women, and they are fewer than 3% of all physicians, scientists, computer specialists or architects. Low Wage Black Women, p. 13. Black women's earnings reflect their status in the workplace: they earn about 59 cents for every dollar earned by a man. U.S. Department of Labor Statistics, Employment and Earnings, January, 1985 [hereinafter cited as Employment and Earnings, January, 1985].

The profile of Hispanic women workers is similarly bleak. Hispanic women are also predominantly clustered in low-paid, semiskilled occupations. Although the large percentage of Hispanic women employed as clericals is similar to the situation among all women, they are employed to a greater extent than are other women in operative jobs -- as dressmakers, assemblers and machine operators. Time of Change. Hispanic women earn approximately 55 cents for every dollar earned by a man. Employment and Earnings, January, 1985.²⁶

²⁶ About 2 million Asians, Pacific Islanders and Native Americans make up the remainder of female workers of color. The leading occupations of Native American women include secretaries, food service workers, teachers, and cleaning and building service workers. Occupations for Asian and Pacific Islander women include work as technicians, secretaries, financial sales, machine operators and teachers. Decade for Women.

Women's employment status translates directly into poverty. Women represented 61% of all persons aged 16 and over who had incomes below the poverty level in 1983. The proportion of poor families maintained by women was 47% in 1983, up from 43 percent. Nearly 72% of black families with incomes below the poverty level were headed by women. Forty six percent of Hispanic families, and 37% of white families were in similar situations. 20 Facts. The over-representation of women -- especially women of color -- among the poor in the country is another indication that the tiny gains that women have achieved in the workplace are simply not enough.

B. Affirmative Action Has Proven To Be An Effective Tool In Ensuring That Women Achieve Equal Employment Opportunity.

Race-conscious relief, rather than a "color-blind" remedial approach to discrimination, is needed to help women achieve equal employment opportunity. Affirmative action, sparked by meaningful enforcement of the anti-discrimination laws, works. The progress achieved by women and minorities males in the workplace has been due in large part to vigorous enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and to enforcement of Executive Order 11246, as amended. Recent studies confirm these observations.

In a 1983 study of the Federal enforcement of Executive Order 11246, as amended, comparing the status of women and minorities in contractor and noncontractor establishments, the author concluded that the contract compliance program has had a positive impact on female and minority employment between 1974 and 1980. Jonathan

Leonard, The Impact of Affirmative Action, University of California, Berkeley, 1983, p. 362. The study also points to litigation under Title VII as a positive factor in improving the employment status of minority males and women.²⁷

In late 1984, a study published by the Potomac Institute found that between 1970 and 1980, as a result of affirmative action, women and blacks experienced significant gains in the job market, with most of the increase concentrated in higher paying jobs. Herbert Hammerman, A Decade of New Opportunity...Affirmative Action in

²⁷ In 1984 the OFCCP released a study entitled Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980, also comparing the status of women and minorities in contractor and noncontractor establishments. The study concluded that "Executive Order establishments posted significantly greater gains in employment in and advancement of women and minorities than those not covered..." Id. p. 37.

the 1970s, the Potomac Institute, October 1984. These studies demonstrate that race-conscious and sex-conscious affirmative action is an effective and necessary tool to achieve equal employment opportunity for workers who historically have suffered discrimination.

CONCLUSION

Based upon the foregoing Amici respectfully urge this Court to affirm the decisions of the Second and Sixth Circuits.

Respectfully submitted,

Marsha Levick
Emily J. Spitzer
(Counsel for Amici*)
Sally Goldfarb
NOW Legal Defense and
Education Fund
99 Hudson Street
New York, New York 10013

*The assistance of Alison Wetherfield, Maria Tobia, Linda Perlmuth, Katrina Church, Veronica Scutaro-Weismann and Charlae Olaker in the preparation of this brief is gratefully acknowledged.

APPENDIX

INTEREST AND DESCRIPTION OF
AMICI CURIAE

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination, including cases before this Court involving challenges to the use of affirmative action remedies to achieve equal employment opportunity.

California Women Lawyers is a state-wide association representing the interests of the approximately fifteen thousand women lawyers in the State of California. It has both individual members and twenty-seven local affiliates throughout the state. CWL is dedicated to education and advocacy regarding legal rights of women and equal treatment for women.

Employment Law Center is a project of the Legal Aid Society of San Francisco. The Center is committed to providing legal services to women and minorities in order to vindicate their right to equal employment opportunity.

Equal Rights Advocates, Inc. is a San Francisco-based public interest legal and educational corporation specializing in sex discrimination. It has a long history of interest, activism, and advocacy in all areas of the law which affect equality

between the sexes. ERA, Inc. has been particularly concerned with gender equality in the work force because economic independence is fundamental to women's ability to gain equality in other aspects of society. ERA, Inc. believes that affirmative action is a necessary and appropriate step if women and minorities are to achieve equal opportunity in the workplace.

The League of Women Voters of the United States (LWVUS, or League) is a national, nonpartisan, non-profit membership organization with a current membership of 110,000 in more than 1250 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Since being founded in 1920, the LWVUS's purpose has been to promote political responsibility through informed and active participation of citizens in government.

The LWVUS believes that no person or group should suffer legal, economic or administrative discrimination, and that government and private institutions share responsibility to provide equal opportunity in employment. As part of its commitment to the eradication of employment discrimination against minorities and women, the LWVUS has participated as an amicus in support of the use of affirmative action remedies in a number of major cases.

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and to the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in the workplace through full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights

statutes, and through the implementation of effective remedies for longstanding employment discrimination against women and minorities.

The Northwest Women's Law Center is a non-profit public interest law organization concerned with securing equal rights for women through the law. It has participated in federal and state litigation and public education efforts directed toward ending unlawful discrimination on the basis of sex. The Law Center has analyzed and commented on local affirmative action plans designed to eliminate past effects of discrimination toward women and minorities. It believes affirmative action is an effective tool toward realizing equality.

Wider Opportunities for Women, Inc. (WOW) is an independent, non-profit, tax-exempt organization which, since 1964, has worked to expand employment opportuni-

ties for women. WOW has provided job counseling, development, referral and training for thousands of women and hundreds of employees. WOW also conducts a national program linking over 80 women's employment organizations throughout the country for increased advocacy on women's employment issues. WOW is strongly supportive of affirmative action as a means of moving women out of poverty toward economic self-sufficiency.

Women Employed is a national organization, based in Chicago, with a membership of 3,000 women workers. Over the past ten years the organization has assisted working women with problems of sex discrimination. Women Employed also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Compliance Programs with regard to a broad range of sex discrimination issues.

The Women's Law Fund, Inc. is a non-profit corporation with the primary purpose of bringing women into full participation in all activities of American life by serving them their full legal rights under the law. The Fund is particularly concerned with the problem of achieving equal employment opportunity for women, and, through its funding of litigation, Women's Law Fund, Inc. seeks to assist all women who are discriminated against because of their sex through illegal employment practices.

Millions of American working women are presently being denied equal opportunities in the job market. Despite high economic motivation to work, women, like minorities, continue to be adversely affected by discriminatory hiring, promotion and lay-off systems. Significant progress has been made where employers, employees and

their bargaining representatives are able to work together to further the goal of equal employment opportunity for all. It is timely for the Court, in the instant case, to recognize the constitutionality of voluntary affirmative action plans as one means of preserving and continuing the progress towards reaching this extremely important goal.

The National Bar Association, founded in 1925, is a professional membership organization which represents more than 10,000 black attorneys, judges and law students. Its purposes include protecting the civil and political rights of all citizens. The NBA, through its Women Lawyers Divisions, has been actively involved in issues concerning equal employment opportunity. The Greater Washington Area Chapter of the Women Lawyers Division is particularly dedicated

to addressing the needs of women in the Washington, D.C. metropolitan area.

Women's Law Project is a non-profit law firm dedicated to advancing the status of women through litigation and public education. Founded in 1973, the Women's Law Project has conducted major litigation on behalf of women in the areas of reproductive freedom, family law, discrimination in employment, credit and insurance, and the rights of female prisoners.

The Women's Law Project is especially concerned with the problems of employed women, and challenged through litigation and public education layoff policies which disproportionately affect women or minorities. Women's Law Project believes in the validity and necessity for sex- and race-based preferences to remedy handicaps of past discrimination and to preserve those gains made by women and minorities in

recent years. Therefore, the Women's Law Project joins with other amici in support of the decision of the courts below.

The Women's Legal Defense Fund (WLDF) is a non-profit, tax exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws. A major priority for WLDF is its project of Women of Color. In its pursuit of equality for both women and minorities, WLDF is committed to the use of affirmative

action to achieve equal employment opportunity.

AMICUS CURIAE

BRIEF

IN THE

JAN 24 1986

Supreme Court of the United States

F. SPANIOLO, JR.,
CLERK

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, *et al.*,

v. *Petitioners,*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS, AFL-CIO, C.L.C.,

v. *Petitioner,*

CITY OF CLEVELAND, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts
of Appeals for the Second and Sixth Circuits

**BRIEF OF CITY OF DETROIT,
THE DISTRICT OF COLUMBIA AND
THE CITY OF LOS ANGELES AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

JOHN H. SUDA

Acting Corporation Counsel

CHARLES L. REISCHEL

District Bldg., Rm. 305

1350 Pennsylvania Ave., N.W.

Washington, D.C. 20004

Attorneys for Amicus Curiae

District of Columbia

JAMES K. HAHN

City Attorney

FREDERICK N. MERKIN

Senior Assistant

City Attorney

ROBERT CRAMER

Assistant City Attorney

1800 City Hall East

200 North Main Street

Los Angeles, CA 90012

Attorneys for Amicus Curiae

City of Los Angeles

DONALD PAILEN

Corporation Counsel

FRANK W. JACKSON

1010 City-County Building

Detroit, Michigan 48226-3491

DANIEL B. EDELMAN *

YABLONSKI, BOTH AND

EDELMAN

1140 Connecticut Ave., N.W.,

2800

Washington, D.C. 20036

(202) 833-9060

Attorneys for Amicus Curiae

City of Detroit

* *Counsel of Record*

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**BRIEF OF CITY OF DETROIT,
THE DISTRICT OF COLUMBIA AND
THE CITY OF LOS ANGELES AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

CONSENT OF THE PARTIES

Petitioners and respondents consented to the filing of this Brief. Their letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICI

The City of Detroit has suffered adverse consequences because of prior discriminatory practices of its public safety agencies, particularly its Department of Police, and a failure to correct the effects of that discrimination. For the past eleven years Detroit has implemented affirmative action plans which have gone far to eradicate the effects of past discrimination against minorities and to cure the crippling effects of that discrimination upon its public safety agencies.¹

¹ Detroit's race-conscious program governing promotions in its Police Department has thus far withstood two separate challenges brought on behalf of white police officers under the Equal Protection Clause and federal civil rights laws. *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), *on remand*, 36 FEP Cases 1019 (E.D. Mich. 1984), *appeal pending* (6th Cir. No. 85-1120) (sustaining race-conscious promotions to the rank of sergeant); *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (sustaining race-conscious promotions to the rank of lieutenant).

Also, the City of Detroit has used race-conscious measures in hiring to the position of firefighter which "for many decades remained, for all practical purposes, the *exclusive domain of white males*." *Van Aken v. Young*, 541 F.Supp. 448, 457 (E.D. Mich. 1982) (emphasis added). The district court's decision upholding those measures has been affirmed. *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984).

The district court in *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), found, after a lengthy trial, that Detroit's steps to increase black representation at all levels of the Police Department had played a vital role in reducing citizen distrust of the police, developing community cooperation with the Department, improving the Department's ability to function, and reducing crime. *Baker, supra*, 483 F.Supp. at 997-1000. Detroit has pursued these programs unilaterally and voluntarily. However, for Detroit and many other public employers, the authority of the judiciary to decree race-conscious measures in the event unlawful discrimination were established through litigation has provided a vital catalyst for voluntary remedial action.

The District of Columbia has similarly suffered the consequences of prior discriminatory practices by its public safety agencies. Presently pending is a challenge to voluntary race-conscious measures governing hiring in its Fire Department which were sustained by the district court as appropriately "designed to break down an old pattern of racial segregation and hierarchy." *Hammon v. Barry*, 606 F.Supp. 1082, 1090 (D.D.C. 1985), *appeals pending*, Nos. 85-5669 5670 5671 (D.C. Cir.).

The City of Los Angeles has addressed from a different perspective the historical underrepresentation of racial minorities and women in its public safety agencies. Without admitting any liability, the City of Los Angeles joined the United States Justice Department and a certified class of women police applicants in recommending entry of three consent decrees establishing goals and timetables for the hiring of racial minorities in the Los Angeles City Fire Department (1974) and for the hiring of racial minorities and women in the Los Angeles Police Department (1980).

Faced with strong statistical showings of underrepresentation in both departments, and a Court of Appeals ruling that police height and physical ability requirements produced disparate impact against women appli-

cants without business necessity, *Blake v. City of Los Angeles*, 595 F.2d 1367, 1375-76 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980), the City elected to resolve this complex litigation. The Los Angeles consent decrees were based largely upon the affirmative action goals and timetables contained within them. If hiring based upon these goals and timetables cannot lawfully occur, costly litigation will reopen, a decade of growth in racial understanding in the two departments will be threatened, and the establishment of sworn services representative of the communities they serve will be delayed.

SUMMARY OF ARGUMENT

Numerous studies by prestigious, national commissions have recognized the crippling effects of unlawful discrimination upon state and local governments, particularly on the operations of police and other public safety agencies. In extending Title VII in 1972 to cover state and local governments, Congress took note of the findings of such studies. Congress aimed to free governmental functions of the crippling effects of discrimination in such vital areas as public safety, education, and the administration of justice.

The Petitioners and their *amici* including the United States contend that the courts are, *regardless* of the inefficacy of other measures, without authority to impose affirmative, race-conscious measures whenever such measures may incidentally involve the hiring or promotion, etc., of persons other than identified discrimination victims. Acceptance of this *per se* challenge would not only strip the federal courts of an essential tool for overcoming patterns of racial exclusion but would also remove a vital catalyst for voluntary action.

Neither Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, nor the Fourteenth Amendment of the United States Constitution requires such a result.

ARGUMENT

I. EXPERIENCE SHOWS THAT MINORITY PARTICIPATION AT ALL LEVELS IS VITAL TO EFFECTIVE PERFORMANCE BY PUBLIC SAFETY AGENCIES.

A *per se* rule that Title VII prohibits the decreeing of race-conscious remedial measures, insofar as such measures incidentally benefit persons not directly victimized by the employer's unlawful conduct,² would stifle efforts to end the mistrust and antagonisms that have developed in our cities between law enforcement agencies and minority citizens. Mutual alienation, with crippling effects on law enforcement and other vital public functions, has resulted in substantial part from long-standing policies and practices of exclusion of minorities from employment in law enforcement agencies. The experience of the City of Detroit is particularly instructive in this regard.

Detroit has suffered, and federal court records document, *see Baker*, 483 F.Supp. at 996-97, racially-based police-community tensions caused in substantial part by years of neglect in the recruitment, hiring and advancement of black public safety officers. Major riots in 1943

² The United States has, until recently, consistently taken the position that affirmative remedies are appropriate under Title VII and the Constitution. The Attorney General and the EEOC have, in carrying out their responsibilities to enforce Title VII, obtained affirmative remedies in numerous cases in which they served as plaintiffs. *See, e.g., United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *E.E.O.C. v. Contour Chair Lounge Co.*, 596 F.2d 809 (8th Cir. 1979); *E.E.O.C. v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977); *Rios v. Enterprise Ass'n Steamfitter Local 638*, 501 F.2d 622 (2d Cir. 1974) (action by United States consolidated with that of individual claimants); *United States v. Masonry Contractors Ass'n*, 497 F.2d 871 (6th Cir. 1973); *United States v. Local Union No. 212, I.B.E.W.*, 472 F.2d 634 (6th Cir. 1973); *United States v. Wood, Wire & Metal Lathers Int'l Union, Local Union No. 46*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973); *United States v. Ironworkers Local 86*, 443 F.2d 544, 548 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971).

and 1967, as well as several other less noted civil disturbances before and after 1967, were just some of the many manifestations of the breakdown of police-community relations. Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year. Moreover, the widespread belief in Detroit's black community that the police lacked interest in investigating black-on-black crime resulted in a loss of essential citizen cooperation in the police department's crime fighting efforts. *Id.* As described by the District Court in *Baker*:

"[T]he Police Department was regarded as an 'occupation army' in the black community and was treated as such Officers were afraid to venture into the [black] community for fear of being harassed or worse.

* * *

The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe.

* * *

Chief Hart testified that '[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; its a matter of record.'

* * *

The black community's response to Department practices was deep hatred and alienation. Not only did the community hate the police, it had no confidence in the police's interest in investigating or solving black on black crime. This lack of confidence was justifiable. The result was that the police got no cooperation from the black community in solving crime.

This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police

Chief Hart, and former Chiefs Tannian and Murphy. So substantial was the community's alienation that at times there was active interference with officers performing their duty.

• • • • •

The police themselves—and ultimately the citizens of Detroit—were the real victims of discriminatory practices.”

Id.

The riots in 1967 jolted the City of Detroit into a realization that something would have to be done to correct these imbalances. *See id.* at 946. Between 1967 and 1973 some efforts were not successful. *Id.* at 947-52. In the interim the City's public safety agencies continued to be hampered by effects of their discriminatory legacy. *Id.* at 996-99.

Finally, in 1974, the City adopted a race-conscious, affirmative action plan of hiring and promotion. *Id.* at 963-64. These efforts have resulted in dramatic improvements in the ability of the Detroit Police Department to deliver effective police service. Perhaps the most stark evidence of the effectiveness of Detroit's affirmative action plan was the reduction in the number of officers killed in the line of duty. Prior to 1974, six to eight police officers were killed each year; from 1974 until 1982, no officers lost their lives in the line of duty.³ *See id.* at 1000. In *Baker*, the district court detailed this and other improvements and concluded:

“There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints against the Department went down, and no police officers were killed in the line of duty.

³ Although Detroit has since suffered the death of smaller numbers of police officers, the police department's relationship with the black community continues to improve.

High ranking police officials attributed this change to the affirmative action program and its general aim of having the Department—at all levels—reflect the City's population.”

Id.

Detroit's experience specifically indicates that visible representation of minorities at all levels of the police department, not merely at the patrol level, is of critical importance in breaking the pattern of hostility and alienation that results from prior exclusion of minorities. As stated by the district court:

“The testimony at trial demonstrates that it is important to have blacks at all levels. The importance of black lieutenants in reducing discriminatory practices cannot be overstated. It is very difficult to mistreat blacks if one knows that the commanding officer is black. Inspector Douglas emphasized that the presence of a black lieutenant at police raids ensured that blacks on the scene would not be abused.

• • • • •

Similarly, a black lieutenant affects the perceptions of the black community. He is a commanding officer whose very presence confirms that blacks are no longer the second-class policemen which they used to be. Chief Hart put it this way:

‘When [citizens] arrive at the precinct stations, they see some black lieutenants sitting behind the desk making decisions on their lives and they feel better about that. They will cooperate with us. They don't feel that we are an army of occupation.’

Id. at 998-99. In the experience of Detroit, the ability to make race-conscious employment decisions has been the critical ingredient in efforts to restore community trust in Detroit's law enforcement agencies and to facilitate Detroit's ability to protect the lives and property of its people. *See id.* at 999.

Overwhelming evidence of the experience in many other cities demonstrates that the crisis experienced by Detroit is only one example of a nationwide problem. The Sixth Circuit has collected and summarized the many studies that make the importance of having racially representative police forces in our cities judicially noticeable. The operational need to have a minority presence in public safety agencies that is representative of the minority population of the community served

"is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, *Final Report: To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. See *To Establish Justice*, *supra* at 145; *Report on Civil Disorders*, *supra* at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders*, *supra* at 301; *Task Force Report: The Police*, *supra* at 144-45, 167; *Police*, *supra* at 330.

These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. . . .

In 1967, a presidential commission stated the proposition offered by the defendants in this case:

In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.

Task Force Report: The Police, *supra* at 167." *Detroit Police Officers Ass'n v. Young*, 608 F.2d at 695.⁴

More recently completed studies have reached the same conclusion. In a report published in October 1981, the United States Commission on Civil Rights found: "Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence." U.S. Commission on Civil Rights, *Who Is Guarding the Guardians: A Report on Police Practices*, 5 (1981). Following an investigation into the May 1980 racial disturbance in Miami, Florida, the U.S. Civil Rights Commission observed: "In Dade County, an essentially white system administers justice to a defendant and victim population that is largely black. The lack of minorities throughout the criminal justice system maintains the perception of a dual system of justice." U.S. Commission on Civil Rights, *Confronting Racial Isolation In Miami*, 290 (1982).

These studies confirm Detroit's experience that minority representation at the higher levels of law enforcement also is crucial. A 1967 Report of the President's Commission on Law Enforcement and Administration of Justice, entitled *Task Force Report: The Police*, concluded that: "[i]f minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policymaking and other crucial decisions." *Id.* at 172. Relying on this and other studies, the Sixth Circuit concluded that the need for a police department representative of the community as a whole "extends to the higher ranks in police depart-

⁴ Other courts of appeals have agreed with the Sixth Circuit concerning the operational need for a racially representative police force. See *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

ments." *Detroit Police Officers Ass'n v. Young*, 608 F.2d at 695.

The federal government also has recognized the public safety crisis created by discrimination against minorities by state and local law enforcement agencies and has called for affirmative action to remedy this problem. The Law Enforcement Assistance Administration (LEAA)² has concluded "that the full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States." 28 C.F.R. § 42.301 (1985). LEAA regulations require that where a "recipient has previously discriminated against persons on the ground of race . . . [or] color . . . , the recipient must take affirmative action to overcome the effects of prior discrimination." 28 C.F.R. § 42.203(i)(1) (1985).³

This Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), upheld the voluntary use of affirmative, race-conscious measures under Title VII as an appropriate

²The LEAA is the arm of the Department of Justice which administers federal financial assistance to state and local law enforcement agencies and which enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3789d.

³The regulations also provide that, "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race . . . [or] color" 28 C.F.R. § 42.203(i)(2) (1985). Although there are statutory provisions stating that the LEAA may not require a recipient to adopt "a percentage ratio, quota system, or other program to achieve racial balance," 42 U.S.C. § 3789d(b), the regulations promulgated thereunder recognize that "[t]he use of goals and timetables is not use of a quota prohibited by this section." 28 C.F.R. § 42.203(j) (1985). Notably, the statute in its original form prohibited remedies intended "to achieve racial balance or to eliminate racial imbalance." 42 U.S.C. § 3766 (1976) (emphasis added). This last restriction was deleted by Section 815(b)(1) of the Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167, 1206 (1979).

means of removing racial barriers and opening employment opportunity. Acceptance of Petitioners' *per se* challenge to the decreeing of such measures would not only strip the courts of an essential remedial tool but would eliminate a vital catalyst to the voluntary affirmative action held salutary in *Weber*. Such a result would go far to defeat the purpose of Congress in 1972 of extending Title VII to state and local governments.

II. THE DESIRE TO CORRECT THE CRIPPLING EFFECTS OF DISCRIMINATION ON PERFORMANCE OF PUBLIC SAFETY FUNCTIONS WAS A LEADING CONCERN OF CONGRESS IN EXTENDING TITLE VII COVERAGE TO STATE AND LOCAL GOVERNMENTS.

In extending Title VII to cover state and local governments, Congress recognized that governmental ability to carry out vital functions in the areas of public safety, education and administration of justice was crippled in many instances by a legacy of discrimination. Congress contemplated that remedies would be devised which would effectively overcome patterns of racial exclusion and thereby remove impediments to government's ability to function. Affirmative remedies mirror Congress' objective.

Subsequent to the enactment of Title VII in 1964, widespread community unrest including riots in numerous cities and other localities provoked a heightened concern regarding the state of race relations in this country. As set forth above, a succession of national commissions drew attention to the low representation of minority groups in policing and other public safety functions as a cause of the disorders.

Congress in 1972 subscribed explicitly to the concerns expressed in these reports. In extending Title VII coverage to state and local governments, Congress looked for guidance specifically to two such reports by the U.S. Commission on Civil Rights: (1) *For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment* (1969), and (2)

Mexican Americans and the Administration of Justice in the Southwest (1970). These two Commission reports were quoted in both the Senate and House Committee reports; referred to in debate by the sponsor of the legislation; and set forth in full in the Congressional Record.

Congress took notice of the crippling effects of racial exclusions from public employment on the ability to govern. It identified the need to remedy this condition as one of the central purposes of extending Title VII to cover state and local governments. The Report of the Senate Committee on Labor and Public Welfare, citing the reports of the U.S. Commission on Civil Rights, stated:

"This failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. . . . Discrimination by government therefore serves a doubly destructive purpose. *The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government.*" S.Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971), reprinted in 1972 Leg. Hist. at 419 (emphasis added).⁷

The Report of the House of Representatives Committee, also citing the Civil Rights Commission reports, was to the same effect:

"The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law

⁷ References to 1972 Leg. Hist. are to Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* (Comm. Print 1972).

enforcement, and the administration of justice) *with the result that the credibility of the government's claim to represent all the people is negated.*" H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17 (1971), 1972 Leg. Hist. at 77 (emphasis added).

Senator Harrison Williams, chairman of the Labor and Public Welfare Committee and sponsor of S.2515, emphasized strongly the Congressional concern for the ability of units of state and local government to carry out their assigned responsibilities. He stated that the Committee had acted out of a belief that their work was "essential to the viability of State and local governmental units." 1972 Leg. Hist. at 1116. He stated that the Senate Committee's concern with employment discrimination was based, in large part, upon the unfavorable impact which it had on "the ability of . . . governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment." *Id.* As Senator Williams succinctly phrased the matter, "*If they are to carry out their jobs with any success whatever, public confidence in their impartiality is vital.*" *Id.* (emphasis added).

In the course of Senate debate, Senator Williams referred to and placed in the Congressional Record, both Reports of the U.S. Commission on Civil Rights. 1972 Leg. Hist. at 1117, *et seq.* With respect to race-conscious remedies, the 1969 Report stated:

" . . . [W]henver in public employment discriminatorily created patterns persist, the Constitution requires that they be remedied *by measures aimed at giving the work force the shape it presently would have were it not for such past discrimination.* It should be recognized that such measures are not a 'preference' but rather a restoration of equality; one can see inequity in such remedies only by being blind to the past injustices which they cure."

1972 Leg. Hist. at 1120 (emphasis added). The Commission's 1969 Report called for state and local governments

to adopt programs which will "bring about whatever changes in minority utilization are necessary to undo the effects of past discrimination." 1972 *Leg. Hist.* at 1120. "Where patterns of minority utilization are to be changed, the program should include specific goals, or estimates, to be achieved within a specified period of time." *Id.* (emphasis added).

Congressional solicitude for assuring the ability of local governmental units to carry out their essential functions is in harmony with court decisions such as *Baker* upholding Detroit's use of race-conscious measures in its police department. It matches precisely the experience of *amici* in pursuing race-conscious affirmative measures to increase minority representation in their public safety departments. To date, those measures have gone far toward undoing the pernicious effects of discrimination which influenced Congress to extend Title VII to cover state and local governments. Rather than being prohibited by § 706 (g), the affirmative measures which are at issue mirror Congress' objective.

III. THERE IS NO BARRIER UNDER TITLE VII OR THE CONSTITUTION TO JUDICIAL DECREES OF RACE-CONSCIOUS RELIEF NEEDED TO ERADICATE EMPLOYMENT DISCRIMINATION AND ITS EFFECTS.

A. Lower Court Decisions Upholding Imposition of Race-Conscious Relief are Firmly-Grounded in Remedial Principles Established by this Court.

The two pending cases present this Court for the first time with the permissibility of court-ordered affirmative relief in litigation involving employment discrimination. Appellate decisions since 1969 have unanimously upheld the permissibility of such relief, where called for by the facts of the particular cases, as consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as well as 42 U.S.C. §§ 1981 and 1983.⁸ Petitioners and *amici*

⁸ The decisions are set forth in the brief of Respondents in *Vanguards*.

including the United States present this Court with a *per se* challenge to such relief. They insist it is impermissible regardless of (1) the nature and effects of the discrimination at issue, (2) its persistence in the face of other forms of relief, (3) the public interest in having racial barriers to equal employment at last effectively removed, and (4) the crippling effect of racial exclusion upon law enforcement and other critical governmental functions.

Like the two cases now before the Court, the great majority of the lower court decisions have involved (a) private sector *craft jobs*, and (b) *public safety jobs* such as firefighting, policing, state highway patrol, and corrections. These fields of employment share a striking characteristic: *all involve positions from which black citizens, other minorities, and females traditionally have been largely, and often totally, excluded.*⁹ In such cases, where

⁹ This Court in *United Steelworkers v. Weber*, *supra*, stated, "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." 443 U.S. at 198, n. 1. The Court proceeded to cite several court of appeals decisions upholding race-conscious remedial measures in some instances imposed by court decree and in others undertaken pursuant to statutory or administrative requirements.

As set forth *supra* (Section II), the pervasiveness of racial exclusions in public safety jobs was a key concern of Congress in amending Title VII to cover state and local governments. Lower courts have likewise called attention to entrenched patterns of racial exclusion from public safety employment. For example, the Sixth Circuit, in the course of sustaining Detroit's voluntary use of numerical ratios for promotions to the rank of police sergeant, stated that the persistence of racial barriers in police employment was equally appropriate for judicial notice as the racial exclusion from craft jobs judicially-noticed in *Weber*. *DPOA v. Young*, 608 F.2d 671, 690 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (see the several cases cited therein). The degree of racial exclusion in the cases involving fire departments exceeds even that in police departments, *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (no blacks among City's 535 firefighters); *Ass'n Against Discrimination v. City of Bridgeport*,

patterns of racial exclusion are especially pronounced and deep-seated, the combination of "make-whole" relief for identified victims and an injunction prohibiting future discrimination, and even ordering steps which are not race-conscious, has frequently failed to bring about increased employment opportunity. In those cases, such race-conscious devices as numerical goals for hiring, promotion, union membership, etc., have proven to be essential tools for overcoming patterns of racial exclusion.¹⁰

20 FEP Cases 985, 989 (D. Ct. 1979) (no blacks among City's 428 firefighters); *Arnold v. Ballard*, 6 FEP Cases 287, 288 (N.D. Ohio 1973); *United States v. City of Alexandria*, 614 F.2d 1358, 1363, n. 12 (5th Cir. 1980). The district court in *Van Aken v. Young*, *supra*, referred to the fire fighter position in Detroit as having been "for many decades . . . the exclusive domain of white males." 541 F.Supp. at 457.

Title VII and affirmative action have opened many opportunities to black workers in craft and public safety employment. See Leonard, *The Impact of Affirmative Action on Employment*, 12 *Journal of Labor Economics* 439 (1984). In 1972 blacks made up 3.2 percent or 15,872 of the 496,000 electricians in the country, whereas in 1979 blacks represented 5.6 percent or 35,480 of the 640,000 electricians in the country. The number of black electricians has more than doubled in these seven years. In general, during the period 1972 through 1979, a period of active Title VII enforcement and affirmative action implementation, the number of blacks working in the craft and kindred census category increased by 270,000. 1980 Statistical Abstract of the United States (1980), at Table 697. In 1970, 6.34 percent or 23,796 of the 375,494 police officers and detectives in the country were black. U.S. Bureau of the Census, *Census of the Population: 1970 Vol. 1, Characteristics of the Population, Part 1, United States Summary—Section 1* (1973), at Table 223. In 1982, 9.3 percent or approximately 47,000 of the 505,000 police officers in the country were black. 1984 Statistical Abstract of the United States (1984), at Table 696.

¹⁰ In employment discrimination cases the lower courts have recognized three distinct types of relief. *Berkman v. City of New York*, 705 F.2d 584, 595-596 (2d Cir. 1983). These include (1) "compliance relief" which restricts the use of practices determined to be illegal and requires the hiring, promotion, etc., of members of the plaintiff class whom the court has found to be victims of the defendant's discrimination, 705 F.2d at 595; (2) "compensatory relief" to "make whole" the victims of the defendant's discrimina-

Under federal civil rights laws and the Constitution, the federal courts have broad powers to remedy prohibited discrimination and its effects. Title VII is no exception. Title VII has, since its enactment, authorized the federal courts to ". . . order such affirmative action as may be appropriate . . .," § 706(g), 42 U.S.C. § 2000e-5(g).¹¹ As

tion as through awards of backpay and constructive seniority, *id.*; and (3) "affirmative relief" designed principally to remedy the effects of discrimination that "may not be cured by the granting of compliance or compensatory relief." *Id.* at 596. "Affirmative relief may also include interim hiring relief that is extended to persons other than members of the plaintiff class"—i.e., persons not victims of discrimination—"and in proportions exceeding the ratio of plaintiff class members to the total applicant pool." *Id.*

¹¹ While the language of § 706(g) was drawn from § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), the argument of the United States based on the NLRA model (United States brief as amicus in *Vanguards*, 8, n. 5) has multiple flaws. First, the United States overlooks this Court's caveat that NLRA principles "generally guide, but do not bind, courts in tailoring remedies under Title VII". *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226, n. 8 (1982) (emphasis added). Second, the labor cases, while stressing the necessity to make whole victims of unfair labor practices, do not address either the circumstances which might call for affirmative relief which extends to nonvictims or the permissibility of such relief. Third, while the labor cases provide a useful guide for the shaping of "make-whole" relief under Title VII, they offer little guidance as to the nature of appropriate affirmative action to remedy racial barriers to equal employment. As to the latter, the lower courts have correctly looked to remedial principles established by this Court in other civil rights areas such as school desegregation and voting rights. Fourth, to the extent the labor cases are at all pertinent, they support permissibility of race-conscious affirmative relief. The labor cases refer to the NLRB's duty to ". . . restor[e] the . . . status quo that would have obtained but for the company's wrongful [act]." *NLRB v. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 263 (1969), and "to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." *Carpenters v. NLRB*, 365 U.S. 651, 657 (1961) (Harlan, J., concurring), quoted in *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 769 (1976) (emphasis added).

"Recreat[ing] the conditions" that would have come to exist but for illegal discrimination, is the essence of race-conscious affirmative

described by Chief Justice Burger, Title VII's primary objective "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971) (emphasis added). In delineating the federal courts' broad remedial mission in Title VII cases, the Court stressed "twin statutory objectives" including not only "making persons whole for injuries suffered through past discrimination" but also "eradicating discrimination throughout the economy. . . ." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (emphasis added).

The lower court decisions, unanimously upholding permissibility of race-conscious, affirmative relief, are firmly-grounded in decisions of this Court. In other civil rights contexts, this Court has declared that federal courts are *not only authorized but obliged to formulate decrees which will succeed in eradicating discrimination and its effects*. Almost contemporaneous with the effectuation of Title VII in 1965, this Court declared—in the context of a historically entrenched racial denial of black citizens' constitutional right to vote—what has since become the key tenet of remedy formulation in civil rights cases, including those under Title VII:

"[T]he court has *not merely the power but the duty to render a decree which will so far as possible elimi-*

relief. As stated in *Rios v. Enterprise Ass'n Steamfitters*, *supra*, 501 F.2d at 631:

"Where a racial imbalance . . . is directly caused by past discriminatory practices *it is readily apparent that if the rights of minority members had not been violated, many more of them would enjoy those rights than presently do so and that the ratio of minority members enjoying such rights would be higher. . . .* The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential." (emphasis added).

nate the discriminatory effects of the past as well as bar like discrimination in the future."

Louisiana v. United States, 380 U.S. 145, 154 (1965) (emphasis added).

In school desegregation decisions spanning the past 20 years, this Court has emphasized the federal courts' authority and duty to root out discrimination and its effects. In *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968), this Court declared that a school board operating a dual system is

"clearly charged with the affirmative duty to take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch." (emphasis added).

This Court emphasized that the "burden on a school board . . . is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Id.* at 439 (emphasis in original). The race-neutral, freedom-of-choice plan before the Court in *Green* held no promise for eliminating racial imbalance and was accordingly disapproved. This Court held in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), that the broad equity powers which arise when a school board fails to carry out its obligation include an array of race-conscious devices to reduce racial imbalance: numerical ratios for student and teacher assignments; redrawing of school boundary lines; pairing of noncontiguous districts, and the decreeing of student transportation. In the words of Chief Justice Burger, in effecting a remedy for a civil rights violation, "[r]ace must be considered. . . ." *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971).

Petitioners and the United States overlook that the myriad of lower court decisions upholding imposition of race-conscious affirmative relief are firmly-grounded in the remedial principles declared in these decisions. In upholding use of race-conscious affirmative remedies in employment cases, lower courts have time and again

looked to the quoted language from *Louisiana v. United States* as well as the marching orders issued in *Green* and *Swann*.

This Court in turn itself endorsed those lower court decisions in the course of opinions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Four members of this Court in *Bakke* stated that Congress in 1972 "explicitly considered and rejected proposals to alter . . . the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action." *Regents of the University of California v. Bakke*, *supra*, 438 U.S. at 353, n.28 (1978) (Opinion of Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgment in part and dissenting in part). Chief Justice Burger in *Fullilove* declared that the remedial powers of the federal courts include race-conscious remedies and the "the authority of a court to incorporate racial criteria into a remedial decree also extends to statutory violations." *Fullilove*, *supra*, at 482-483 (Opinion of Burger, C.J., White, J., and Powell, J. announcing judgment). Justice Powell predicated approval of the set-aside provision in *Fullilove* on criteria utilized by the courts of appeals in what he termed the "closely analogous area" of "race-conscious hiring remedies." *Id.* at 510. (Powell, J., concurring). He referred approvingly to the lower courts' practice of imposing "temporary hiring remedies insuring that the percentage of minority group workers in a business or governmental agency will be reasonably related to the percentage of minority group members in the relevant population." *Id.* at 513.

B. Race-Conscious Relief Has Often Proved Essential to the Elimination of Racial Barriers Which Cripple Law Enforcement and Other Public Functions.

In many employment cases, the lower courts have found racial exclusions and barriers every bit as pervasive and intractable as those posed by the disenfranchisement of black citizens at issue in *Louisiana v. United States* and the unconstitutional segregation of black school children

which persisted after *Brown I* and *Brown II*. For example, in *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974), the Fifth Circuit upheld imposition of race-conscious hiring relief, including a numerical ratio and goal, in the case of the Alabama Highway Patrol, long the most visible instrument of white supremacy in the State of Alabama.¹² As reasons for upholding the appropriateness of affirmative hiring relief in the particular case before it, the Fifth Circuit noted the Alabama Highway Patrol's long history of intentional discrimination, its failure to take positive corrective steps on its own initiative, and its 37-year old reputation as an all-white organization. See 493 F.2d at 620-21. Indeed, an injunction prohibiting continued racial discrimination which had been issued 18 months previously in related litigation had failed to result in the hiring of a single black employee. *Id.* at 621. In such circumstances, the Fifth Circuit's approval of a race-conscious hiring remedy constituted virtually an inevitable application of the remedial principles this Court established in other fields of civil rights litigation.

The inefficacy of race-neutral relief in opening employment opportunities for blacks in public employment in Alabama has been recently detailed by Douglas B. Huron. Huron & Pendleton, *Equality of Opportunity, or Equality of Results?*, 13 Human Rights 18 (Fall 1985).¹³ As re-

¹² The decision was explicitly grounded upon this Court's three decisions in *Louisiana v. United States*, *Swann*, and *Green*. See 493 F.2d at 617, 619. The Fifth Circuit observed that use of "mathematical ratios" is a "useful starting point in shaping a remedy to correct past unconstitutional violations" in cases of employment discrimination litigation just as in desegregation of schools. *Id.* at 619-20 (quoting *Swann*, 402 U.S. at 25).

¹³ Separate articles by Mr. Huron, a former senior trial attorney in the Justice Department Civil Rights Division and associate White House counsel, and Clarence M. Pendleton, Chairman of the U.S. Commission on Civil Rights, were juxtaposed under this title in the form of a debate on race-conscious affirmative action.

counted by Mr. Huron, the district court's order quickly brought about the hiring of Alabama's first black troopers. *Id.* at 22. Within two years, there were a substantial number of blacks on the force and the director of Public Safety data testified they were competent professionals. *Id.* Today, according to Mr. Huron, Alabama has one of the most integrated state justice forces in the country; over 20% of the troopers and 25% of support personnel are black. *Id.* The implications for black employment opportunity in other Alabama state agencies have proven immense:

"When Justice contrasted the initial results on the trooper force with the lack of progress in other Alabama agencies, the department went back into court, asking that hiring ratios be applied to entry-level jobs in the other Alabama agencies. Judge Johnson gave the agencies plenty of time—over two years—to mend their ways.

When little changed, he issued a decision finding statewide discrimination, but he demurred to Justice's plea for quotas. He said that 'mandatory hiring quotas must be a last resort,' and he declined to order them. But he noted that the denial would be 'without prejudice' to Justice's seeking the same relief one year later: 'In the event substantial progress has not been made by the 70 state agencies, hiring goals will then be the only alternative.'

The message—the threat—could not have been clearer, and the agencies immediately began to come around. In the eight largest departments, which together account for close to 75 percent of all state workers, black employment increased by over half between 1975 and 1983 and now stands at over 20 percent. And black workers, who used to be concentrated in menial jobs, now appear in substantial numbers in nearly all the larger job categories.

No doubt problems remain in Alabama, but the only fair conclusion is that dramatic progress has been achieved in public employment for blacks over the past decade. And in view of the history of the Ala-

bama litigation, it is clear that this would not have occurred if Judge Johnson had not first imposed a hiring quota on the state troopers—and then threatened to extend it statewide if the other agencies did not alter their discriminatory practices." Id. (emphasis added).

Notably, Chairman Pendleton, who took the opposing view in the article, offered no suggestion as to how employment opportunities would have been opened to blacks in such agencies as the Alabama Highway Patrol without the use of race-conscious measures. Nor do the Petitioners and their *amici* in these cases.¹⁴

C. The 1972 Amendments to Title VII Accentuate the Authority of Federal Courts to Decree Race-Conscious Affirmative Relief in Appropriate Cases.

As amended in 1972, the first sentence of § 706(g) now authorizes a court to order "such affirmative action as

¹⁴ In its strained attempt to square its new reading of § 706(g) with the remedial principles this Court established in other civil rights areas, the United States transparently misinvokes this Court's teaching that the "scope of the remedy" must fit "the nature and extent of the . . . violation." Brief for the United States as Amicus Curiae Supporting Petitioner in No. 84-1999 at 6-7. It is *precisely because* the lower courts repeatedly found that make-whole relief to discrimination victims failed to match the extent of a defendant's discrimination that they found affirmative, race-conscious relief to be required. The United States seizes from context a single isolated phrase ("[a] desegregation remedy" is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)) as if to suggest that this Court somehow required relief in school desegregation cases to be "victim-specific." The passage, in context, says only that a desegregation remedy could not extend to neighboring jurisdictions not shown responsible for segregation in the school district at issue. The principle that the "scope of the remedy" must fit "the nature and extent of the . . . violation", has never supported the rigid stricture that civil rights remedies must be victim-specific. The very notion that school desegregation would be required only on behalf of "specific victims" and not black students as a group is patently absurd.

may be appropriate, which may include, but is not limited to, reinstatement, or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (emphasized language added in 1972). The amended language was drawn by the conference committee from the Senate-approved version of the statutory amendment. 1972 Leg. Hist. at 1816-1817, 1838-1839. The section-by-section analysis stated that the revised § 706(g) was "intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible." 1972 Leg. Hist. at 1848 (emphasis added).

The new language derived from amendments offered by Senator Dominick and other opponents of a proposal to shift enforcement powers to the EEOC. Senate Bill S.2515, as reported by the Senate Committee, proposed such a shift. 1972 Leg. Hist. at 382-383. Senator Dominick's amendments retained enforcement authority in the courts but, by way of compromise, expanded upon the breadth of the courts' remedial authority. 1972 Leg. Hist. at 553, 1348, 1499. The Senate adopted Amendment No. 878 as modified by No. 884. 1972 Leg. Hist. at 1561. In debate, Senator Dominick praised the courts' performance in remedying civil rights violations and specifically in formulating remedies under Title VII.¹⁵ Contrary to the United

¹⁵ Explaining the first of his proposed amendments which included the revised language accentuating federal judicial authority, Senator Dominick stated that the amendment "offers a welcome opportunity . . . to strike a small, but perhaps significant blow for the judicial branch of our Government." 1972 Leg. Hist. at 697. He stated, "Consider for a moment where minorities would be without the monumental court decisions recognizing and protecting their rights in education, in public accommodations, in housing, in voting and in equal employment." *Id.* at 691. Senator Dominick cited a statement of Assistant Attorney General David L. Norman in favor of continued court enforcement; one of the reasons given by the then chief of the Civil Rights Division was "the fact that Federal courts resolve the factual and legal issues in equal opportunity cases in the areas of voting, housing and education" which "make[s] them a

States, (United States Br. in *Vanguards*, 12, n. 9), it is obvious that the amendment sought to counter those who favored EEOC enforcement, by an expansion upon the courts' remedial powers.

Ironically, Senator Dominick argued in the course of the debates on his proposed amendments that the federal courts "are free from the subtleties of political winds that occur when an administration changes course or a new administration comes in" 1972 Leg. Hist. at 678, 692. Congress' decision to retain court enforcement was thus geared to insulate Title VII enforcement from precisely such shifts in "political winds" as evidenced by the United States' present attacks on judicial decrees whose entry it previously pressed, *see* n. 2, *supra*.

Congress in 1972 also specifically rejected proposals to bar the ordering of race-conscious relief. Senator Ervin proposed to prohibit government agencies from requiring employers to adopt goals or quotas for the hiring of minorities. 1972 Leg. Hist. at 1017. Senator Javits, who led the debate against the Ervin proposal, explained that the amendment would affect not only the activities of federal agencies, but also the scope of judicial remedies available under Title VII. 1972 Leg. Hist. at 1046, 1048.¹⁶

particularly appropriate forum for resolving the same kinds of issues in employment discrimination cases." *Id.* at 1485.

Supporters of these amendments argued to the same effect. Senator Fannin stated that the "court enforcement method would more effectively repair injuries caused by employment discrimination . . ." and that "the district courts are experienced in handling civil rights matters, having in recent years dealt effectively with a broad spectrum of civil rights cases, including those involving employment discrimination." *Id.* at 698-699. Senator Cooper stated "the Senator from Colorado is correct . . . that the greatest progress in the field of civil rights against discrimination has been through the decisions of the courts." *Id.* at 1533.

¹⁶ Senator Javits referred to court decisions ordering race-conscious relief as well as the decisions upholding race-conscious administrative measures such as the Philadelphia Plan. At his request, *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th

He stated his view that "[w]hat this amendment seeks to do is to undo . . . court decisions" approving use of race-conscious remedies. *Id.* at 1048. The amendment was rejected by a 2 to 1 margin. *Id.* at 1074.

A similar amendment offered by Congressman Dent to the House bill was also not adopted. 1972 *Leg. Hist.* at 190, *et seq.* Congressman Dent's amendment was addressed to H.R. 1746 which, as reported out of Committee, proposed to transfer OFCC administration to the EEOC; the amendment proposed that EEOC not be empowered to require federal contractors to adopt goals and timetables as had been done by OFCC in administering E.O. 11246. Ultimately, administration of the Executive Order was left with OFCC and the Dent amendment was not directly addressed. *Id.* at 312-314.

The House debate reflects agreement that—unlike OFCC's authority with respect to the Executive Order—the EEOC had previously had no authority to require employees to adopt goals and timetables as an aspect of substantive compliance with Title VII. Contrary to arguments of *amici* (Br. of Local 542, IUOE, at 10-13), the debate does not reflect agreement that federal courts were without authority to decree race-conscious measures as remedies for established violations. The House's ultimate action in leaving administration of the Executive Order with OFCC—with administrative authority intact to require adoption of goals and timetables—is to the contrary. *A fortiori* the House did not mean to interfere

Cir. 1971), *cert. denied*, 404 U.S. 984 (1971) was printed in the Congressional Record, along with *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971). See 1972 *Leg. Hist.* at 1048-1070.

Additionally, Senator Javits referred approvingly to two consent decrees recently entered at the Justice Department's behest which contained race-conscious relief. Senator Javits stated the Ervin amendment "would make it impossible for the Justice Department to obtain such decrees in the future." 1972 *Leg. Hist.* at 1071.

with the remedial use of race-conscious measures by the courts.¹⁷

Since 1972, the lower courts have repeatedly relied on the disposition of the Dent and Ervin amendments in construing Title VII to authorize the imposition of race-conscious relief. *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 177 (3rd Cir. 1977) *cert. denied*, 438 U.S. 915 (1978); *United States v. Elevator Constructors, Local 5*, 538 F.2d 1012, 1019-1020 (3rd Cir. 1977); *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017, 1028 (1st Cir. 1974); *United States v. IBEW, Local 212*, 472 F.2d 634, 636 (6th Cir. 1973).

While the United States criticizes reliance by the lower courts on the history of these amendments (United States Br. in *Vanguards*, 12-14), this Court has itself found such legislative history to be persuasive specifically with respect to other rejected efforts to modify the relief provision of Title VII. *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 420 & n. 13 (rejection of bills to limit judicial power to award backpay).

¹⁷ After correctly describing the history of these proposals, Local 542, IUOE misleadingly concludes that participants in the House discussions did not propose to change "the fact that Title VII does not authorize court-ordered racial quotas." (Br. at 13). This supposed "fact" was, as of 1972, contrary to positions taken by five courts of appeals, not merely two as asserted by Local 542 (Br. at 13, n. 9). In addition to the Fifth Circuit in *Local 53 of Int'l Ass'n of Heat & Frost I & A Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) and the Ninth Circuit in *Iron Workers Local 86*, *supra*, the Third, Sixth and Eighth Circuits had all declared the federal courts empowered to make remedial use of race-conscious measures: *Contractors Ass'n of Eastern Pa. v. Sec. of Labor*, *supra*, 442 F.2d at 173 n. 47 ("federal courts in overcoming the effects of past discrimination are expressly authorized in Title VII to take affirmative action"); *United States v. IBEW, Local 38*, *supra*, 428 F.2d at 151 (rejecting "pro forma" judgment, remanding for "appropriate affirmative relief", and endorsing use of race-conscious relief in *Vogler* and other decisions); *Carter v. Gallagher*, *supra*, 452 F.2d at 329-330 ("even the anti-preference treatment section of the . . . Civil Rights Act of 1964 does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices"; endorses *Vogler*, *Ironworkers Local 86*, etc.).

D. This Court's Decision in *Stotts* Does Not Disapprove Imposition of Race-Conscious Affirmative Relief.

Petitioners and the United States contend that *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S.Ct. 2576 (1984), disapproves lower court decisions sustaining race-conscious relief and limits court-ordered relief under Title VII to identified discrimination victims. This contention has been rejected by each of the courts of appeals which have addressed it to date.¹⁸ The lower courts in *Stotts*, in allowing recently-hired minority employees to displace more senior employees, had effectively awarded such minority employees with "make-whole" relief in the form of competitive seniority. In doing so, the *Stotts* majority said, the lower courts had violated not only § 703(h)'s protection of *bona fide* seniority systems but also the policy of § 706(g) limiting "make-whole" relief to identified discrimination victims. While "make-whole" relief, such as backpay and retroactive seniority, is limited by § 706(g) to discrimination victims, affirmative relief to eradicate the effects of discrimination is not. *Stotts* merely applies the obvious limitation of "make-whole" relief to discrimination victims.

Had this Court in *Stotts* meant to disapprove race-conscious hiring and promotions, it would surely have called for modification of the underlying decrees which included such relief, 104 S.Ct. at 2581, in line with the principles specifically noted in note 9 of the majority opinion. *Id.* at 2587.¹⁹

¹⁸ Br. of United States in *Vanguards*, 17.

¹⁹ Subsequent to the *Stotts* decision, the Department of Justice addressed letters to some 50 state and local jurisdictions which are parties to existing court decrees which include race-conscious hiring and/or promotion relief analogous to that involved in the Memphis case. The United States has filed motions in some cases asking that the affirmative relief it had previously advocated and successfully obtained be vacated in light of *Stotts*. Just as this Court found no occasion in *Stotts* to call for the vacating of the affirmative hiring relief embodied in the 1974 and 1980 decrees covering the Memphis fire department, the lower courts have thus far rejected the conten-

The United States' argument that race-conscious, affirmative relief is precluded by the last sentence of § 706(g) is practically identical to one made against judicial authority to decree race-conscious measures in school desegregation cases which this Court dismissed as meritless in *Swann*, *supra*, 402 U.S. at 16-17. *Swann* held busing and other race-conscious remedies available despite Title IV of the 1964 Civil Rights Act which specified (1) that "'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance", 42 U.S.C. § 2000c(b), and (2) that the statute did not "empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils . . . to achieve such racial balance." 42 U.S.C. § 2000c-6. With respect to Title IV, which parallels the last sentence of § 706(g), this Court found "no suggestion of an intention to . . . withdraw from courts their historic equitable remedial powers." *Swann*, *supra*, 402 U.S. at 17. *Swann* exemplifies this "Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to obtain this objective." *Regents of University of California v. Bakke*, *supra*, 438 U.S. at 355 (Opinion of Brennan, White, Marshall, Blackmun, J.J.).

Tellingly, the United States does not directly argue that race-conscious, affirmative relief was in fact unneeded in the cases where the Justice Department and the EEOC pressed for its entry. Different administrations

tion that *Stotts* requires the vacating of such relief. See *United States v. City of Buffalo*, 609 F.Supp. 1252 (E.D.N.Y. 1985), *aff'd*, 39 FEP Cases 1168 (2d Cir. 1985); *In re Birmingham Reverse Discrimination Employment Litigation*, No. Cv.84-P-0903F (N.D. Ala.) (Tr. of Proceedings of December 20, 1985, 1342-1360); *United States v. Richard Albrecht, et al.*, C.A. 80-C-1590 (N.D. Ill.) (Order of August 23, 1985); *United States v. State of New Jersey*, C.A. Nos. 950-73, 77-2054, 79-184 (D. N.J.) (Order of July 26, 1985) (Motion of private reverse discriminatees).

may disagree regarding the correct parsing of § 706(g). However, the United States makes no persuasive counter-argument to its long-standing, prior view regarding the vital role of race-conscious measures in the cases of such all-white bastions as the Alabama Highway Patrol.

The foundation for the lower court decisions sustaining race-conscious, affirmative relief remains firm. As long as the federal courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future," *Louisiana v. United States*, *supra*, 380 U.S. at 154, the use of race-conscious numerical ratios and goals must remain an available tool to remove persisting racial barriers to equal employment.

CONCLUSION

This Court should decisively reject the contention that affirmative, race-conscious remedies are prohibited. The decisions in these cases should be affirmed.

Respectfully submitted,

JOHN H. SUDA

Acting Corporation Counsel

CHARLES L. REISCHEL

District Bldg., Rm. 305

1350 Pennsylvania Ave., N.W.

Washington, D.C. 20004

Attorneys for Amicus Curiae

District of Columbia

JAMES K. HAHN

City Attorney

FREDERICK N. MERKIN

Senior Assistant

City Attorney

ROBERT CRAMER

Assistant City Attorney

1800 City Hall East

200 North Main Street

Los Angeles, CA 90012

Attorneys for Amicus Curiae

City of Los Angeles

DONALD PAILEN

Corporation Counsel

FRANK W. JACKSON

1010 City-County Building

Detroit, Michigan 48226-3491

DANIEL B. EDELMAN *

YABLONSKI, BOTH AND

EDELMAN

1140 Connecticut Ave., N.W.,

2800

Washington, D.C. 20036

(202) 833-9060

Attorneys for Amicus Curiae

City of Detroit

* *Counsel of Record*

AMICUS CURIAE

BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS AFL-CIO, C.L.C.,

Petitioner,

v.

CITY OF CLEVELAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, and LOCAL 28 JOINT
APPRENTICESHIP COMMITTEE,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
CITY OF NEW YORK, and NEW YORK STATE
DIVISION OF HUMAN RIGHTS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED PEOPLE,
THE AMERICAN CIVIL LIBERTIES UNION AND
THE NATIONAL BLACK POLICE ASSOCIATION AS
AMICI-CURIAE IN SUPPORT OF RESPONDENTS
CITY OF CLEVELAND, THE VANGUARDS OF
CLEVELAND, CITY OF NEW YORK
AND STATE OF NEW YORK

HAROLD R. TYLER
JAMES ROBERTSON
NORMAN REDLICH

Trustees

WILLIAM L. ROBINSON
RICHARD T. SEYMOUR
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Suite 400,
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

January 24, 1986.

PAUL C. SAUNDERS
Counsel of Record

BETSY A. BRENE
STACEY E. ELIAS
CRAVATH, SWAIN & MOORE
One Chase Manhattan Plaza
57th Floor
New York, N.Y. 10005
(212) 422-3000

Attorneys for Amici-Curiae

Counsel continued on inside cover

E. RICHARD LARSON

BURT NEUBORNE

AMERICAN CIVIL LIBERTIES

UNION FOUNDATION

132 West 43rd Street

New York, N.Y. 10036

(212) 944-9800

GROVER G. HANKINS

CHARLES E. CARTER

NATIONAL ASSOCIATION FOR

THE ADVANCEMENT OF

COLORED PEOPLE

186 Remsen Street

Brooklyn, N.Y. 11201

(718) 858-0800

Attorneys for Amici-Curiae

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CONSENT OF PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICI

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. Over a thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted it in such efforts.

The National Association for the Advancement of Colored People is a New York nonprofit membership corporation. Its principal aims and objectives include promoting equality of rights and eradicating caste or race prejudice among the citizens of the United States and securing for them increased opportunities for employment according to their ability.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States.

The National Black Police Association ("NBPA") is a nationwide organization comprised of nearly 100 local black police associations representing 720,000 black police officers throughout the United States. Among the purposes of the NBPA is the elimination of discrimination in public safety

departments, particularly in employment with its concomitant effect of improving the delivery of public safety services to all members of the community.

Amici have a direct interest in the long-established principle that Federal courts have wide discretion in fashioning remedies for violations of Title VII and may impose classwide numerical relief where necessary. Without such relief in appropriate cases, we and our clients will be impeded—perhaps totally precluded—in our efforts to vindicate the civil rights of minority groups that have historically been victimized by unlawful discrimination.

STATEMENT OF THE CASES

1. Local 93

On October 23, 1980, the Vanguard of Cleveland ("the Vanguard"), minority firefighters employed by the City of Cleveland, filed a class action complaint in the United States District Court for the Northern District of Ohio alleging discrimination by the City in the hiring, promotion and assignment of minority firefighters in violation of the Thirteenth and Fourteenth Amendments, Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983.

The parties then entered into settlement negotiations, and during the negotiations, Local 93 of the International Association of Firefighters ("Local 93") intervened.

The Vanguard and the City filed a proposed consent decree on November 2, 1981. The court held evidentiary hearings on January 7-8 and April 27-28, 1982, to consider Local 93's objections to the proposed decree.

On November 12, 1982, the magistrate reported that a tentative agreement had been reached by the three parties. The agreement, which contained promotional goals for minority firefighters, was later rejected by the membership of Local 93.

The Vanguard and the City then submitted another proposed consent decree that was substantially the same as the

plan negotiated by the leaders of Local 93 but rejected by the Local 93 membership. Local 93 opposed court approval of the decree.

The district court adopted the proposed consent decree on January 31, 1983. The court found that the evidence "revealed a historical pattern and practice of racial discrimination in promotions in the City of Cleveland's Fire Department". The court concluded that the affirmative action plan incorporated in the proposed consent decree was a reasonable remedy in light of that discrimination and adopted the consent decree as a fair, reasonable and adequate resolution of the claims.

The Sixth Circuit, after reviewing the district court's findings, held that the district court did not abuse its discretion in approving the consent decree, affirmed the district court's order and denied Local 93's request for a rehearing *en banc*.

2. Local 28

The Department of Justice instituted this action in the United States District Court for the Southern District of New York in 1971 against Local 28 and its Joint Apprenticeship Committee ("JAC") under Title VII of the Civil Rights Act of 1964 to enjoin a pattern and practice of discrimination against nonwhites.¹ Shortly thereafter the EEOC was substituted as plaintiff, the City of New York intervened as a plaintiff and the New York State Division of Human Rights ("State"), initially named a third-party defendant, realigned itself with the EEOC and the City.

After a three week trial in 1975, Judge Henry F. Werker found that Local 28 and the JAC had purposely discriminated against nonwhites in violation of Title VII.

¹ Local 28 and its JAC had a long history of involvement in employment discrimination litigation prior to the commencement of this action in 1971. See *State Commission for Human Rights v. Farrell*, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. New York Co. 1964); *State Commission for Human Rights v. Farrell*, 47 Misc. 2d 244, 262 N.Y.S.2d 526 (Sup. Ct. New York Co.), *aff'd*, 24 A.D.2d 128, 264 N.Y.S.2d 489 (1st Dept. 1965); *State Commission for Human Rights v. Farrell*, 52 Misc.2d 936, 277 N.Y.S.2d 287 (Sup. Ct. New York Co.), *aff'd*, 27 A.D.2d 327, 278 N.Y.2d 982 (1st Dept. 1967).

In July 1975, the court entered an order and judgment ("O&J") and appointed an administrator to propose and implement an affirmative action plan ("AAP"). The Second Circuit affirmed Judge Werker's finding that Local 28 and the JAC intentionally violated Title VII, but reversed two provisions of the O&J and the AAP. 532 F.2d 821, 829-33 (2d Cir. 1976).

Judge Werker then adopted, and the Second Circuit affirmed, a revised AAP and Order ("RAAPO") that established a nonwhite membership goal of 29% to be achieved by July 1, 1982, and ordered Local 28 and the JAC to develop the apprenticeship program, to increase and maintain nonwhite enrollment, to maintain detailed records regarding union employment practices and to submit periodic reports summarizing those records. 565 F.2d 31, 33-36 (2d Cir. 1977).

A. First Contempt Proceeding

On April 16, 1982, the City and State moved to hold Local 28 and the JAC in contempt for violating the district court's orders by failing to take the required steps to meet the 29% membership goal by July 1, 1982.

In August 1982, Judge Werker, after studying voluminous evidence, concluded that Local 28 and the JAC had "failed to comply with RAAPO . . . almost from its date of entry" and held Local 28 and the JAC in civil contempt. Local 28's contravention of court orders included: underutilization of the apprenticeship program, refusal to conduct a general publicity campaign, adoption of an older workers' job protection provision, issuance of unauthorized work permits to white workers from sister locals and failure to maintain and submit records as required by RAAPO and the EEOC. The court concluded: "I am convinced that the collective effect of these violations has been to thwart the achievement of the 29% goal of nonwhite membership in Local 28 established by the court in 1975. . . . I have no other recourse but to hold the defendants in civil contempt of court." Judge Werker imposed a \$150,000 fine to be placed in a training fund.

B. Second Contempt Proceeding

On April 11, 1983, the City brought a second contempt proceeding, this time before the administrator, charging Local 28 and the JAC with further violations of the O&J, RAAPO and orders of the administrator. The administrator, after a hearing, found that Local 28 failed to provide records required by RAAPO in a timely fashion, that Local 28 and the JAC failed to provide accurate data and that Local 28 failed to serve RAAPO on the contractors who hired Local 28's members. He recommended that defendants again be held in civil contempt.

Judge Werker adopted the administrator's recommendation that Local 28 and the JAC be held in civil contempt and in September 1983 Judge Werker adopted an amended AAP and Order ("AAAPO"), that made six important changes in RAAPO. Among other changes, AAAPPO required that one nonwhite apprentice be indentured for every white apprentice and that contractors employ one apprentice for every four journeymen employed; it also established a 29.32% nonwhite membership goal to be reached by July 31, 1987.

The Second Circuit affirmed all contempt relief ordered against Local 28 and the JAC and rejected defendants' arguments that the affirmative race-conscious relief contained in AAAPPO was prohibited by Title VII, the Constitution or this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984). However, the court carefully reviewed AAAPPO to ensure that the relief granted was warranted by the factual findings of the district court. The Court affirmed AAAPPO but eliminated the intermediate one-to-one apprenticeship ratio. 753 F.2d 1172, 1183-89 (2d Cir. 1985).

SUMMARY OF ARGUMENT

Title VII was enacted to halt discriminatory employment practices and to eradicate the present and future effects of past discrimination. To achieve those goals, the courts were given wide discretion and authority under section 706(g), 42 U.S.C. § 2000e-5(g), to order effective relief.

Since the enactment of Title VII the Federal courts have adjudicated thousands of employment discrimination cases. In a small number of those cases the courts, after carefully reviewing the evidence presented, determined that a classwide numerical remedy was the only effective and practical remedy sufficient to achieve the goals of Title VII. Every circuit has reviewed the award of such relief in either a litigated decree or a consent decree and every circuit has approved it.

In awarding or reviewing the imposition of numerical remedies, the courts have taken great care to evaluate the remedy awarded in light of the purpose and duration of the goal and its effect on nonminorities. Numerical goals counterbalance deeply entrenched favoritism toward nonminorities and foster inclusion of minorities in workforces from which they had been excluded. When properly utilized and carefully tailored, numerical goals do not result in invidious "reverse discrimination" but simply and fairly bring nonminority expectations into line with what would obtain had there been no historical unlawful discrimination against minorities.

Nothing in the plain language of the statute or in the legislative history of Title VII limits a court's choice of remedies to correct a violation of Title VII to "make-whole" relief for identifiable victims of discrimination. As the courts that dealt with employment discrimination cases for over two decades recognized, racial discrimination is by its nature a class wrong and though it is often impossible to identify individual victims, many actual victims exist.

The elimination of classwide numerical relief as a possible remedy would prevent the courts from effectuating the goals of Title VII in the most egregious cases of racial discrimination. Such a result would emasculate Title VII and effectively erase more than twenty years of civil rights progress through the legal system.

ARGUMENT

I. CLASSWIDE RACE-CONSCIOUS NUMERICAL RELIEF IS A PRACTICAL NECESSITY; IT IS SOMETIMES THE ONLY REMEDY THAT CAN EFFECTUATE THE CRITICAL POLICY UNDERLYING TITLE VII.

The central objective of Title VII is to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). The courts, in a continuing effort effectively to promote that policy, have come to the realization that section 706(g) cannot be interpreted, consistent with that objective, to eliminate a court's discretion under Title VII to order numerical relief as the remedy in cases where such relief is necessary.

The failure of other remedies to achieve elimination of "the last vestiges" of discrimination, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), illustrates the direct conflict between the position of petitioners and the Solicitor General on the one hand, and the policies underlying Title VII on the other.

A. *It Would Be Impossible Effectively To Enforce Title VII Without Classwide Numerical Relief In Appropriate Cases.*

Numerical relief is not required, nor should it be, in every case in which violations of Title VII are found. There have been thousands of employment discrimination cases litigated since the enactment of Title VII; yet courts have found it necessary to impose numerical goals in fewer than 100 of those cases.² Nevertheless, courts in every circuit have encountered cases where the purpose of Title VII simply could not be effectuated without the affirmance or imposition of classwide numerical relief. In those cases an injunction reiterating Title VII's prohibition against discrimination or individual make-whole relief would be useless and would result in endless enforcement litigation. A Federal court must have the dis-

² That number is derived from reported litigated decrees.

cretion to tailor relief that it determines is necessary and that will be effective in the specific situation before it.

1. *Ingrained Patterns of Racial Discrimination*

Courts have justified the imposition of numerical relief in several types of situations. In many of the cases where numerical relief has been imposed, discriminatory practices were particularly long-standing or egregious and resulted in total or near total exclusion of minorities. In many instances numerical relief was ordered only after injunctive or other relief failed to eradicate the unlawful discrimination.

In 1974, the Fifth Circuit acknowledged the shortcomings of relief that allowed the actor who committed the discriminatory practices to "self-correct" its own unlawful behavior. *Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974).

In *Morrow*, the district court found that the Mississippi Highway Patrol had engaged in unlawful discrimination in the employment of patrol officers. Specifically, the court found that while 36.7% of the population of the State of Mississippi was black, the Mississippi Highway Patrol had never employed a black officer. Of the 27 bureaus within the Department of Public Safety, only two had any black employees and these were low level jobs. Of the Department's 743 employees, only 17 were black. The court declined to order affirmative numerical hiring goals or preferences and instead entered a decree enjoining the Mississippi Highway Patrol from future unlawful discrimination and requiring the Patrol actively to recruit black patrol officers. 3 Fair Empl. Prac. Cas. (BNA) 1162 (S.D. Miss. 1971). A Fifth Circuit panel affirmed:

"Time may prove that the district court was wrong, i.e., that the relief ordered was not sufficient to achieve a nondiscriminatory system and eliminate the effects of past discrimination. But until the affirmative relief ordered has been given a chance to work, we cannot tell." 479 F.2d 960, 964 (5th Cir. 1973).

However, the Court *en banc* reversed and ordered the district court to "fashion an appropriate decree which will have the certain result of increasing the number of blacks on the

Highway Patrol". 491 F.2d at 1055. The Court did so because there was already strong evidence that lesser measures would be ineffective: sixteen months after the entry of the decree, there had been only six black patrol officers hired during a period when 90 patrol officers were added to a total force of approximately 500 troopers. The *en banc* court instructed the district court to order, among other things, some form of affirmative hiring relief such as temporary one-to-one or one-to-two hiring ratios until the patrol was effectively integrated. *Id.* at 1056.

The *Morrow* court recognized that discrimination against a class cannot be eliminated by a mere promise to hire more minorities in the future. The court has an obligation to develop a plan that "works and works now." *Id.*

The need for race-conscious numerical relief is similarly highlighted by a comparison of two cases arising in the Middle District of Alabama, *NAACP v. Allen*, 340 F. Supp. 703 (M.D.Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974), and *United States v. Frazer*, 317 F. Supp. 1079 (M.D.Ala. 1970). *Allen* was a private action brought to challenge the exclusion of blacks from employment in the Alabama Department of Public Safety. *Frazer* was an action brought by the Attorney General to challenge racial discrimination against blacks in the employment of persons engaged in the administration of federally financed grant-in-aid programs in several Alabama agencies.

In both cases, the district court, Chief Judge Johnson, made detailed findings of widespread discrimination against blacks in recruitment and hiring highlighted by defendants' nearly total exclusion of blacks from employment. *Allen*, 340 F. Supp. at 705; *Frazer*, 317 F. Supp. at 1087. Judge Johnson ordered relief for specific black victims and prophylactic injunctive relief in *Frazer*, 317 F. Supp. at 1090-93, and interim and long term numerical hiring goals in *Allen*, 340 F. Supp. at 706.

Comparing progress under the *Allen* decree imposing numerical goals on the Department of Public Safety and the

Frazer decree simply enjoining discrimination at a number of Alabama agencies, Chief Judge Johnson stated:

"The *Frazer* decree has a much wider scope than the *Allen* order, which focuses on only one agency—the Alabama Department of Public Safety—but the decree in *Frazer* lacks the precision achieved in *Allen* through the use of hiring goals. The contrast in results achieved to this point in the *Allen* case and the *Frazer* case under the two orders entered in those cases is striking indeed. Even though the agencies affected by the *Frazer* order and the Department of Public Safety draw upon the same pool of black applicants—that is, those who have been processed through the Department of Personnel—*Allen* has seen a substantial black hiring, while the progress under *Frazer* has been slow and, in many instances, nonexistent. . . . Today the Alabama Department of Public Safety has nearly one hundred (100) blacks employed in nonmenial jobs in both trooper and support positions. With its eighty (80) black support personnel, the Alabama Department of Public Safety has nearly as many black clerical employees as all seventy-five (75) other Alabama state agencies combined!

"Thus in a radical discrimination in employment type case, when the parties are entitled to relief by reason of the fact that their constitutional rights have been violated, this Court's experience reflects that the decrees that are entered must contain hiring goals; otherwise effective relief will not be achieved."

NAACP v. Allen, sub nom. United States v. Dothard, 373 F. Supp. 504, 506-07 (M.D. Ala. 1974) (footnotes omitted).

The facts in *Local 28* also demonstrate that the mere recalcitrance of some employers in complying with Title VII could defeat the purpose of the Act if courts did not have the power to order the discriminating employers to seek to achieve numerical goals by a time certain.

Some employers and organizations have dug in their heels and refused to comply with the mandates of Title VII, even after a judicial finding of violation. In those cases, and in cases in which numerical relief is necessary as a practical matter, courts must have the power to order effective relief.

2. *Removal of Disparate Impact of Discriminatory Procedures*

Courts have also determined that interim numerical goals are a most effective and efficient method of removing the discriminatory impact of an invalid hiring or promotional test. Interim hiring or promotional goals eliminate the disparate impact of the invalid selection practice, allow employers to begin hiring and promoting immediately and prevent a further violation of Title VII.

For example, affirmative interim hiring goals were properly imposed in *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978), *modified and aff'd*, 633 F.2d 643 (2d Cir. 1980). In *Buffalo*, the district court, after a lengthy trial, found that the City had engaged in a pattern and practice of discrimination against blacks, Spanish-surnamed Americans and women in police and firefighter hiring. The court found, for example, that while 20.4% of the City's population and 17.5% of its labor force were black, only 2.7% of the uniformed police officers and 1.2% of the firefighters were black. 457 F. Supp. at 621. The various tests for police and firefighter hiring were found not to be demonstrably related to job performance. *Id.* at 622-29. At the urging of the Department of Justice, the court entered a final decree which included, among other things, interim hiring goals providing that 50% of new police appointments must be minorities and 25% must be women, such goals to remain in effect until the city developed valid selection procedures or until the percentage of minorities and women in the police department equalled the percentage of minorities and women in the City's labor force. The Second Circuit slightly modified the decree by eliminating its long term aspects and affirmed the rest of the district court's decree including the interim goals:

"[T]he ratio chosen was appropriate in light of 'the resentment of non-minority individuals against quotas of any sort and of the need of getting started to redress

past wrongs." . . . The figures chosen here were not unreasonably high in light of the finding of serious discrimination and lack of previous progress, the slow rate of hiring projected in the police department, and the likelihood that prior discrimination had discouraged minorities and women from applying for jobs." 633 F.2d 643, 647 (2d Cir. 1980).

Thus while all police officer candidates must still take and pass the non-valid test, the City's selection of minorities, out of rank order if need be, to satisfy the hiring goal eliminates the discriminatory impact of the test. The interim hiring goals were particularly effective since, after almost six years, the City has still not developed a valid selection procedure. An order requiring the City to develop valid selection procedures without an interim hiring goal would plainly have been ineffective; it also would have turned the district judge into a personnel director, monitoring all new hiring to prevent further Title VII violations.³

The promotional goals contained in the consent decree in *Local 93* are similar to the interim hiring goals ordered in *Buffalo*. The promotional goals seek to remove the disproportionate impact of the City of Cleveland's admittedly discriminatory promotion procedures and to begin to eradicate the effects of the past discrimination.

The use of interim hiring or promotional goals is particularly important in public sector cases like *Buffalo* and *Local 93*. Without the use of some form of affirmative action there could be no hiring or promoting (until valid selection procedures could be developed). Such freezing of all appointments or promotions in a city's police or fire department could present a hazardous situation to the citizens of the community. See, e.g.,

³ In 1985 the Department of Justice sought to modify the final decree, arguing that after this Court's decision in *Stotts*, the interim hiring goals were unlawful. The district court denied the Department's motion, rejecting the Department's interpretation of *Stotts* and holding that *Stotts* was inapplicable. 609 F. Supp. 1252 (W.D.N.Y. 1985). The Second Circuit affirmed. No. 85-6212, slip op. (Dec. 19, 1985), and a petition for certiorari was filed on December 24, 1985, *sub nom. Afro-American Police Ass'n, Inc. v. United States*.

Berkman v. City of New York, 536 F. Supp. 177, 216 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983).

Interim hiring and promotional goals have occasioned very little dispute because they merely end the discriminatory impact of an otherwise unlawful test and are not unfair to nonminorities. They do not discriminate against "better qualified" whites because the selection procedures they correct are not job related; thus "better qualified" applicants cannot be identified. See *Commonwealth of Pennsylvania v. Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1481 (E.D. Pa. 1975).

B. Victim-Specific Relief Is Often Too Narrow To Achieve The Goals Of Title VII.

The consensus among the courts on the appropriateness of classwide numerical relief is premised in large part upon practical considerations. It is easier to structure complete and fair relief in cases where identifiable individuals have been injured by unlawful discriminatory employment practices. In such cases courts award limited relief that will make those specific, individual victims whole. However, many cases are not limited to findings of individual discrete wrongs against a few identifiable victims but involve long-standing and blatant discrimination against *all* class members.

In many of the most egregious cases, it is impossible to point to a single individual as the victim. For example, given *Local 28's* long history of intentional discrimination and its reluctance to change its discriminatory practices even after a Court Order, it is certain that the Union rejected many, if not all, black applicants for racial reasons. Further, it failed to keep detailed employment records as required by EEOC regulations, making it virtually impossible to find and identify actual victims of petitioners' discrimination. The only effective remedy in such cases is one benefiting the class as a whole, see *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 660 (2d Cir. 1971), and it would be unfair to preclude such relief simply because a few (or, indeed, many) class members may benefit even though they were not identifiable victims of discrimination. Petitioners and the Solicitor General contend that even in such a situation, each applicant is required to show that had his or her appli-

cation been considered, without regard to race, he or she would have been hired. That is inconsistent with the fundamental purpose of Title VII.

The Second Circuit in reaffirming the interim hiring goals ordered in *Buffalo, supra*, slip op. at 739, 742, stated:

"The hiring inequities were serious and were clearly the product of discrimination. The harmful effects were equally serious and broad in scope. The victims were not simply a small number of identifiable persons who might be made whole by a narrowly-drawn 'make-whole' decree but a large group, most of whom could not be individually identified. . . . Such broad discriminatory conduct demands equally broad prospective equitable relief. Otherwise the wrong will not be remedied. 'Make-whole' relief, absent ability to identify the individual victims, would be pointless and ineffective."

This Court, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), addressed the danger of limiting relief to an overly narrow group of plaintiffs. While *Teamsters* did not pose the exact issue now before this Court, the relief structured by the Court in that case illustrates a basic point: denying affirmative relief to non-applicants and other victims of discrimination who cannot readily be identified "could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups." *Id.* at 365.⁴

⁴ Justice Stewart, writing for this Court, cited decisions where courts have granted affirmative relief under the National Labor Relations Act, the model for Title VII's remedial provisions, even though identification of specific victims was impossible. *Id.* at 366-67. Justice Stewart also cited several Title VII cases where courts of appeals had held that nonapplicants can be victims of unlawful discrimination entitled to make-whole relief. *Id.*

Such a limitation on the equitable powers granted to courts by Title VII

"would be manifestly inconsistent with the 'historic purpose of equity to secure complete justice' and with the duty of courts in Title VII cases 'to render a decree which will so far as possible eliminate the discriminatory effects of the past.'"

Id., citing *Albemarle*, 422 U.S. at 418.

C. *Effective Eradication Of Past Discrimination Requires Integration In The Workplace.*

There is more to eliminating the "last vestiges" of employment discrimination than simply enjoining discriminatory practices. The lingering reputation of the employer as a discriminatory entity continues to pose a formidable obstacle to minorities seeking entry into the workforce. As the *en banc* Fifth Circuit pointed out a decade ago in *Morrow, supra*, 491 F.2d at 1056:

"[W]e are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of [minorities]"

On the other hand, if an employer is under an obligation to hire or promote minorities, whether imposed by court-structured relief or agreed to in a consent decree, the certain result will be an increase in minority participation in that employer's institution. As awareness of that participation spreads by word of mouth minorities will no longer perceive as futile efforts to obtain jobs in the same employment sector. See generally *id.*

Injunctions without numerical goals require tremendous faith in the very same employer who felt no obligation to obey Federal statutes outlawing employment discrimination in the first place. The reality is that such faith is often misplaced. See, e.g., *Morrow, supra*, 491 F.2d 1053; *Dothard, supra*, 373 F. Supp. 504.

II. COURTS ARE INVESTED WITH WIDE DISCRETION UNDER SECTION 706(g) TO ORDER CLASSWIDE RACE-CONSCIOUS NUMERICAL RELIEF WHERE SUCH RELIEF IS NECESSARY TO EFFECTUATE THE PURPOSES OF TITLE VII.

A. Section 706(g) of Title VII Permits Many Forms of Relief Including Prospective Classwide Affirmative Relief And Make-Whole Relief As Remedies For Employment Discrimination.

In enacting Title VII, Congress sought to eliminate employment discrimination and eradicate the evils of its existence. To do so, Congress took care to arm the courts with full equitable powers and therefore section 706(g) explicitly authorizes courts "to order such affirmative action . . . as the court deems appropriate". Pursuant to that broad equitable power courts have ordered a wide range of relief for injuries occasioned by discriminatory and unlawful employment practices. See, e.g., *Berkman*, *supra*, 705 F.2d at 595-96.

"Make-whole" relief is intended "to make persons whole for injuries suffered on account of unlawful employment discrimination". *Albemarle*, *supra*, 422 U.S. at 418. Petitioners and the Solicitor General concede that much.

Prospective race-conscious classwide relief, including numerical remedies, on the other hand, is directed to the achievement of equality of employment opportunities and the removal of barriers that have operated in the past to favor an identifiable group of white employees over other employees. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

Eleven circuits have held that prospective affirmative race-conscious relief including numerical remedies is permissible under Title VII⁵ and is sometimes the only effective and practical remedy.

⁵ E.g., *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Chisholm v. United States Postal Service*, 665 F.2d 482, 499 (4th Cir. 1981); *Firefighters Institute for Racial Equality v. City of St. Louis*, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *United States v. City of*

In addition this Court has steadfastly held in other contexts that prospective affirmative classwide race-conscious relief is not only constitutional but a most appropriate means of remedying the effects of past discrimination.⁶

Until recently the government consistently sought the imposition of classwide prospective numerical relief in cases where such relief was necessary to effect complete relief. See briefs filed by the United States at both the district and appellate levels in: *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *NAACP*

Chicago, 663 F.2d 1354, 1362 (7th Cir. 1981) (*en banc*); *United States v. City of Alexandria*, 614 F.2d 1358, 1363-66 (5th Cir. 1980); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 943-44 (10th Cir. 1979); *EEOC v. American Telephone & Telegraph Co.*, 556 F.2d 167, 174-177 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Rios v. Enterprise Association Steamfitters Local 638*, 501 F.2d 622, 629 (2d Cir. 1974); *United States v. Masonry Contractors Association of Memphis, Inc.*, 497 F.2d 871, 877 (6th Cir. 1974); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). The Eleventh Circuit has approved consent decrees containing numerical remedies. *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3424 (U.S. Dec. 10, 1985) (No. 85-999); *Turner v. Orr*, 759 F.2d 817 (11th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3086 (U.S. July 31, 1985) (No. 85-177), but has not yet been directly confronted with the validity of such relief under Title VII in a court ordered decree.

⁶ E.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980) ("10% set aside" of federal funds for minority businesses under provision of the Public Works Employment Act of 1977 does not violate the Civil Rights Act of 1964 or the Constitution); *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978) (Powell, J., joined by White, J.) and at 355-79 (Brennan, White, Marshall and Blackmun, JJ., concurring) (State University may permissibly use race as a factor in admissions); *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (Reapportionment of voting districts in accordance with specific numerical racial goals is permissible under of the Voting Rights Act of 1965); *McDaniel v. Barresi*, 402 U.S. 39 (1971) (To insure integrated school system, School Board properly took racial figures into account in redrawing school districts); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (To insure integrated school system, court may properly use racial ratios in both districting and faculty assignment and order busing); *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969) (district court may properly order faculty and staff desegregation pursuant to flexible racial ratios in order to insure an integrated school system).

v. Allen, *supra*, 493 F.2d 614; *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Local 638*, *supra*, 532 F.2d 821; *EEOC v. AT&T*, *supra*, 556 F.2d 167; *Buffalo*, *supra*, 633 F.2d 643; *United States v. Ironworkers Local 86*, 315 F. Supp. 1202 (W.D. Wash. 1970); *NAACP v. Allen*, *supra*, 340 F. Supp. 703; *United States v. City of Chicago*, 411 F. Supp. 218 (N.D. Ill. 1976); *Local 638*, *supra*, 421 F. Supp. 603; *EEOC v. AT&T*, 419 F. Supp. 1022 (E.D. Pa. 1976); *Buffalo*, *supra*, 457 F. Supp. 612.

Although prospective race-conscious numerical relief is still necessary in certain cases, the Solicitor General now asserts that such relief is unlawful. Petitioners and the Solicitor General assert that the last sentence of section 706(g) prohibits class-wide prospective relief and limits a court's power to awarding make-whole relief to identifiable victims of discrimination.

The Third Circuit rejected that argument in *EEOC v. AT&T*, *supra*, 556 F.2d 167. That court carefully analyzed the "make-whole" language and the legislative history of the last sentence of section 706(g) and held that that sentence was intended to strike an equitable balance between class members seeking relief under Title VII and employers who are subject to the mandates of Title VII. "[T]he sentence does not speak at all to the showing that must be made by individual suitors, or class representatives on behalf of class members, or the EEOC on behalf of class members. The sentence merely preserves the employer's defense that the non-hire, discharge, or non-promotion was for cause other than discrimination." *Id.* at 176. See also *Williams v. City of New Orleans*, 729 F.2d 1554, 1558 n.4 (5th Cir. 1984) (en banc).

By its plain language section 706(g) establishes both make-whole and classwide prospective relief as appropriate remedies for Title VII violations. As recognized by the Second Circuit last month:

"The source of the court's power to issue broader prospective relief is found in its powers as a court of equity and in the broad language of § 706(g), which authorizes the court to 'enjoin the respondent from engaging in such unlawful practice, and order such

affirmative action as may be appropriate, which may include but is not limited to, reinstatement or hiring of employees . . . or any other equitable relief as the court deemed appropriate"

Buffalo, *supra*, slip op. at 742 (emphasis in original).

The court in *Buffalo* noted that section 706(g) sets out a nonexclusive list of possible remedies for Title VII violations including "reinstatement or hiring of employees." The nonexclusivity of the listed remedies is apparent from Congress's insertion of the language "which may include but is not limited to" and the closing phrase "or any other equitable relief as the court deems appropriate." *Id.*

The last sentence of section 706(g) does not refer to or affect in any way the discretionary power given to courts in the language of the first sentence of section 706(g). The last sentence addresses itself only to make-whole remedies and means exactly what it says—no employer will be required to hire, promote, reinstate or award back pay to any *specified individual* unless that individual was an actual proven victim of discrimination.

B. Congress Intended To Invest District Courts With Wide Authority To Remedy Discrimination And Endorsed The Courts' Use Of Affirmative Classwide Race-Conscious Numerical Remedies In Appropriate Cases.

During the floor debates in both houses a common objection vigorously pressed by opponents of Title VII was that it would take autonomy away from employers and unions and force them to hire unqualified minorities in order immediately to integrate their work force and to maintain racial balances without any showing or finding that the employer or union had engaged in unlawful discrimination in violation of Title VII.

Of course, the bill proposed no such thing. Representative Celler and Senator Humphrey emphasized the fact that nothing in Title VII required an employer to maintain a racial balance among employees through the use of a quota or to hire unqualified minorities. As this Court noted in *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979), section

703(j) was incorporated in the Dirksen-Mansfield substitute bill to silence the opposition's fears, and to make clear that Title VII did not *require* the maintenance of a racial balance through use of quotas.

In *Weber* this court recognized that 703(j) provides that nothing in Title VII *requires* an employer to grant preferential treatment to any group on account of a *de facto* racial imbalance in the employer's work force. *Weber, supra*, 443 U.S. at 206-07. The Department of Justice similarly interpreted 703(j), drawing the following distinction:

"[W]here there has been an *intentional* policy of unlawful racial discrimination resulting in the exclusion of blacks from employment opportunities, as the lower court found here, the limitation on preferential treatment [in 703(j)] has no application." Brief of Appellee United States, at 49-50, filed Feb. 10, 1971, in *United States v. Ironworkers Local 86* (No. 26048 9th Cir.) (emphasis in original).

The passage of the Equal Employment Opportunity Act of 1972, which amended Title VII, emphatically establishes the proposition (if it were unclear before) that classwide numerical relief is a lawful remedy under section 706(g) and does not violate section 703(j). The views of the 1972 Congress expressed during the debates on the amending act are of considerable significance.⁷ During the Senate's consideration of the amending act, Senator Ervin, one of the original opponents of the Civil Rights Act, proposed two amendments to S. 2515, the Senate equivalent of H.R. 1746 (the amending bill). The

⁷ The EEOC and Department of Justice now disavow their earlier position that the statements of the 1972 Congress should be awarded great weight in interpreting section 706(g).

"The ruling in *Teamsters, supra* n.39, that views of a later Congress should be given little weight in interpreting a provision enacted in 1964, does not pertain here, since in 1972 the remedial provision of Section 706(g) . . . was amended and expanded . . ." Opp. Cert. Brief of the Federal Respondents (Department of Justice and the EEOC) filed in *Communications Workers of America v. EEOC*, Nos. 77-241, 242, 243 (Nov. 1977).

first amendment proposed to add a new section to the bill that would read:

"No department, agency or officer of the United States shall require any employer to practice discrimination in the reverse by employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges. . . ."

118 Cong. Rec. 1662 (1972), *Legislative History of the Equal Employment Opportunity Act of 1972*, reprinted in Subcomm. on Labor of the Senate Committee on Labor and Public Welfare at 1017 (hereinafter "1972 Leg. Hist.").

Senator Javits, speaking against the amendment, noted that the amendment would not only restrain a department, agency or officer of the United States but would also affect a court's power to remedy discrimination under Title VII.⁸ Cong. Rec. at 1664, 1972 Leg. Hist. at 1046. *Accord id.* at 1676, 1972 Leg. Hist. at 1072 (remarks of Sen. Williams) ("I am desperately afraid—that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination.").

There can be no doubt that at the time of the debates on the Ervin Amendment Congress was fully aware that courts had ordered classwide race-conscious numerical relief pursuant to their powers under Title VII, and that the Philadelphia Plan, a plan developed under Executive Order 11246 requiring government contractors to meet race-conscious numerical goals, had been sustained by the Third Circuit. Senator Javits during the floor debates described the facts and holdings of two cases and caused the entire text of each case to be printed in the

⁸ "[T]he depth of this amendment is much greater than is apparent on the surface because it would purport not only to inhibit in given respects the officers of the United States but also the courts of the United States through whom, once they make a finding or a judgment, the officers of the United States are moved." *Id.* at 1664, 1972 Leg. Hist. at 1046 (Remarks of Senator Javits).

Congressional Record. *Ironworkers Local 86, supra*, 315 F. Supp. 1202, reprinted at 118 Cong. Rec. 1665-71, 1972 Leg. Hist. at 1063-1070, upheld the award of classwide, race-conscious numerical relief under Title VII, and *Contractors Association v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), reprinted at 118 Cong. Rec. 1671-75, 1972 Leg. Hist. at 1047-63, upheld the Philadelphia Plan as being consistent with Title VII.⁹ Senator Javits then summarized his objections to the amendment:

"So, there I believe that the amendment does two things, both of which should be equally rejected.

"First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia type plans.

"Second, the amendment, in addition to dismantling the Executive order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the effort to correct these injustices." *Id.* at 1665, 1972 Leg. Hist. at 1048.

⁹ Senator Javits also referred to *United States v. Enterprise Association Steamfitters Local 638*, 337 F. Supp. 217 (S.D.N.Y. 1972), "I am told, and I believe the information to be reliable, that under the decision made last week by Judge Bonsal in New York, in the Steamfitters case, an affirmative order was actually entered requiring a union local to take in a given number of minority group apprentices." *Id.* at 1665, 1972 Leg. Hist. at 1048. Senator Javits also described two cases involving consent decrees negotiated by the Justice Department:

"In one case, part of the decree required that 166 Negroes and Puerto Ricans be given preference—in filling future vacancies for which they were qualified.

"In the other case in Kansas, the company agreed to make a good faith effort to hire from three minority groups for 20 percent of the clerical positions to be filled in the next three years.

"This amendment would make it impossible for the Justice Department to obtain such decrees in the future." *Id.* at 1675, 1972 Leg. Hist. at 1071.

The second amendment proposed by Senator Ervin sought to apply section 703(j) to the executive, thus, as Senator Javits noted, "[making] unlawful any affirmative action plan like the so-called Philadelphia Plan". *Id.* at 4918, 1972 Leg. Hist. at 1715.

The Senate rejected both amendments by two-to-one margins. *Id.* at 1676, 4918, 1972 Leg. Hist. at 1074-75, 1716-17.

A section-by-section analysis of the final version of H.R. 1746, the amending bill, submitted by the Conference Committee of the House and Senate, provides:

"In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."

1972 Leg. Hist. at 1844. While the 1964 legislative history was somewhat cloudy, the 1972 amendments to Title VII and section 706(g)¹⁰ emphasize Congress's intention to allow the courts wide discretion in fashioning effective remedies, including numerical goals, for employment discrimination.

"The provisions of this subsection [706(g)] are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible." 1972 Leg. Hist. at 1848.

¹⁰ Title VII was extended to cover public employers and section 706(g) was amended to include the italicized words:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the Court deems appropriate. *Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission . . .*"

1972 Leg. Hist. at 1902.

Prior to the enactment of the 1972 amendments, numerical goals or other group relief had been ordered in at least nine Title VII cases,¹¹ including *Ironworkers Local 86*, *supra*, printed in the Congressional Record by Senator Javits. The courts had clearly decided that Title VII did not prohibit classwide numerical remedies. Thus, Congress's rejection of the Ervin amendment was an unambiguous endorsement of the judicial interpretation of the broad scope of section 706(g) remedial powers conferred by the 1964 Act, including the power to order classwide numerical relief. *See, e.g., United States v. International Union of Elevator Constructors, Local 5*, 538 F.2d 1012, 1019-20 (3d Cir. 1976); *EEOC v. AT&T*, *supra*, 556 F.2d at 177 ("[T]he solid rejection of the Ervin Amendment confirmed the prior understanding by Congress that an affirmative action quota remedy in favor of a class is permissible.").

The Department of Justice and the EEOC, initially and throughout the 1970s, consistently interpreted section 706(g) as providing the Federal courts wide discretion in formulating relief, including numerical remedies, for Title VII violations. *See, e.g.,* briefs submitted by the United States in *United States v. International Union of Elevator Constructors, Local Union No. 5*, *supra*; *EEOC v. AT&T*, *supra*. That interpretation should be accorded deference. *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n.12 (1982).

The Solicitor General's new "interpretation" is not entitled to any deference, however, because it is not contemporaneous

¹¹ *Vogler v. McCarty, Inc.*, 1 Fair Empl. Prac. Cas. (BNA) 197, 200 (E.D. La. 1967), *aff'd sub. nom. Heat and Frost Insulators v. Vogler*, 407 F.2d 1047, 1054 (5th Cir. 1969); *United States v. Ironworkers Local 86*, *supra*, 315 F. Supp. at 1247-52; *United States v. Central Motor Lines, Inc.*, 325 F. Supp. 478, 479 (W.D. N.C. 1970); *Thorn v. Richardson*, 4 Fair Empl. Prac. Cas. (BNA) 299, 303 (W.D. Wash. 1971); *Buckner v. Goodyear Tire and Rubber Co.*, 339 F. Supp. 1108, 1124 (N.D. Ala. 1972), *aff'd*, 476 F.2d 1287 (5th Cir. 1973); *United States v. Wood, Wire & Metal Lathers International Union, Local 46*, 341 F. Supp. 694, 698 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir.), *cert denied*, 412 U.S. 939 (1973); *United States v. IBEW, Local 212*, 5 Fair Empl. Prac. Cas. (BNA) 469, 470, 478 (S.D. Ohio 1972), *aff'd*, 472 F.2d 634 (6th Cir. 1973); *United States v. Bricklayers, Local 1*, 5 Fair Empl. Prac. Cas. (BNA) 863, 881-82 (W.D. Tenn. 1973); *Sims v. Sheet Metal Workers, Local 65*, 353 F. Supp. 22 (N.D. Ohio 1972), *aff'd*, 489 F.2d 1023 (6th Cir. 1973).

with the enactment of the statute or its amendment. *Cf. General Electric Co. v. Gilbert*, 429 U.S. 125, 140-43 (1976); *California Hospital Association v. Henning*, 770 F.2d 856, 859 (9th Cir. 1985).

III. FEDERAL COURTS HAVE AWARDED OR APPROVED NUMERICAL RELIEF ONLY AFTER A CAREFUL EXAMINATION OF THE NEED FOR THE RELIEF AND THE EFFECT SUCH RELIEF WOULD HAVE ON NONMINORITIES.

The Federal courts have taken great care in shaping relief to fit the specific situation presented. The courts have not lightly and freely imposed or approved affirmative numerical relief. Rather, the courts have limited and tailored affirmative relief to meet the specific needs of each case while taking care to limit and reduce the effects of such relief on nonminorities. There is no specific standard governing the imposition of numerical relief because the relief ordered in any particular Title VII case must be unique and individual to the specific facts of that case. Nevertheless, certain factors useful in assessing the advisability of affirmative relief have been developed.

The factors most commonly considered by courts were articulated by this Court in *Weber*, *supra*, 443 U.S. 193. This Court, while declining to "define in detail the line of demarcation between permissible and impermissible affirmative action plans", nevertheless examined the purpose and duration of Kaiser's affirmative action plan and its effect on third parties before determining that the "plan falls on the permissible side of the line." *Id.* at 208.

The courts' responsible use of discretion and careful adherence to this Court's guidance in *Weber* is exemplified by two cases in the Fifth Circuit. In *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980), the Fifth Circuit used the same factors that were discussed in *Weber* to review de novo the proposed settlement between the Department of Justice and the City of Alexandria, which the district court had declined to approve, because it contained affirmative hiring relief for women and blacks in the police and fire departments. *Id.* at

1361. The Fifth Circuit determined that the proposed consent decree was appropriate given the presence of severe statistical imbalances. The court noted that the goals were temporary, did not bar the advancement of white males and did not require defendants to consider unqualified women and blacks for vacancies. The court concluded that "the goals will thus serve to prevent those responsible for personnel decisions from automatically choosing a white male when there is a qualified black or female. This attempt to break down traditional patterns which foreclose opportunities to blacks and women was the motivation behind Title VII." *Id.* at 1366 (citations omitted).

Accordingly, the court reversed the district court's refusal to enter the consent decree and remanded, instructing the district court to enter the decree. *Id.* at 1367.

In *Williams v. City of New Orleans*, 543 F. Supp. 662 (E.D. La. 1982), the district court, after a four day fairness hearing, declined to approve the proposed consent decree unless the one-to-one promotion goal was deleted. The trial court determined that the goal exceeded the court's remedial objectives and seriously jeopardized the career interests of nonminorities. A three-judge panel of the court of appeals concluded that the trial court had abused its discretion in conditioning its approval of the proposed consent decree on the deletion of the promotion goal and remanded the case instructing the court to sign the decree. 694 F.2d 987 (5th Cir. 1982).

On rehearing *en banc*, the Fifth Circuit found that the district court, properly following the *Weber* guidelines, did not abuse its discretion in finding that the "one-to-one promotion ratio was overbroad and unreasonable in light of the severe and longlasting effect on the rights of women, Hispanics and non-Hispanic whites." 729 F.2d 1554, 1561 (5th Cir. 1984) (*en banc*). The panel emphasized:

"The ideal goal in this type case is to provide a suitable remedy for the group who has suffered, but at the least expense to others. . . . [W]e do not modify our previously expressed view that temporary hiring goals are ordinarily reasonable. . . . Title VII

implicitly recognizes that there may be cases calling for one remedy and not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts." *Id.* at 1564 (citations omitted).

Those cases are neither an aberration nor a signal of a recent judicial shift. The history of judicially-imposed and judicially-approved affirmative relief in this country over the past two decades amply demonstrates judicial caution and selectivity.¹²

Similarly, the relief imposed in *Local 28* and approved in *Local 93* was carefully formulated and analyzed by the district courts and was scrutinized on review by the courts of appeal. In both cases the relief presently at issue before this Court was found to be necessary and appropriate relief in light of the facts of each case. In neither case did the courts find that the rights of nonminorities were unnecessarily trammelled.

¹² For example, in *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission of the City of New York*, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), the Second Circuit reviewed the record and the district court's findings and determined that they were insufficient to support long-term or interim affirmative hiring goals but found that an interim compliance goal was permissible. In *United States v. City of Buffalo*, *supra*, 633 F.2d 643, the Second Circuit determined that the record did not support imposition of a long term affirmative goal but approved as appropriate an interim affirmative hiring goal. In *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 2357 (1985), the District of Columbia Circuit vacated the district court's imposition of promotional goals and timetables because "strict goals and timetables should not be imposed when alternative equally effective methods could . . . supplant resort to a quota." *Accord Thompson v. Sawyer*, *supra*, 678 F.2d at 294; *United States v. City of Chicago*, *supra*, 549 F.2d at 437; *NAACP v. Allen*, *supra*, 493 F.2d at 621. (Numerical goals were imposed reluctantly by the trial courts in these cases after non-numerical relief proved ineffective. In each case the affirmative relief imposed was affirmed by the appellate court.)

IV. *STOTTS* DOES NOT PROHIBIT PROSPECTIVE RACE- AND GENDER-CONSCIOUS RELIEF UNDER TITLE VII.

We agree with the appellate courts that have uniformly rejected the government's argument and have held that *Stotts* did not overrule, *sub silentio*, and in dictum, nearly twenty years of Title VII law without discussing or even acknowledging the competing public policies implicated in this issue and in the array of precedential decisions.

Petitioners and the Solicitor General have read too much into *Stotts*. The courts of appeals have not interpreted the *Stotts* decision as limiting the remedial arsenal of section 706(g) to make-whole relief for identifiable victims of discrimination.¹³ Not one has interpreted it as a bar to all classwide race-conscious remedies whether ordered after litigation or entered pursuant to a consent decree. Rather the courts view *Stotts* as the proper application of make-whole relief upon the facts of that case. We suggest this Court should agree.

¹³ *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985); *Buffalo, supra*, No. 85-6212, (2d Cir. Dec. 19, 1985); *Local 638, supra*, 753 F.2d 1172 (2d Cir.), cert. granted, 106 S. Ct. 58 (1985); *Commonwealth of Pennsylvania v. Local 542, Operating Engineers*, 38 Fair Empl. Prac. Cas. (BNA) 673 (3d Cir. 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), cert. denied, 105 S.Ct. 782 (1985); *Wygant v. Jackson Bd. of Education*, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 105 S.Ct. 2015 (1985); *Vanguards, supra*, 753 F.2d 479 (6th Cir.), cert. granted, 106 S.Ct. 59 (1985); *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984); *Britton v. South Bend Community School Corporation*, 775 F.2d 794 (7th Cir. 1985); *Grann v. City of Madison*, 738 F.2d 786 (7th Cir. 1983), cert. denied, 105 S.Ct. 296 (1984); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356 (9th Cir. 1985); *Paradise v. Prescott, supra*, 767 F.2d 1514; *Turner v. Orr, supra*, 759 F.2d 817.

CONCLUSION

The judgments of the courts of appeals in both *Local 93* and *Local 28* should be affirmed.

Respectfully submitted,

HAROLD R. TYLER
JAMES ROBERTSON
NORMAN REDEICH
Trustees

WILLIAM L. ROBINSON
RICHARD T. SEYMOUR
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Suite 400,
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

E. RICHARD LARSON
BURT NEUBORNE
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

January 24, 1986.

PAUL C. SAUNDERS
Counsel of Record

BETSY A. BRENN
STACEY F. ELLIS
CRAVATH, SWAIN & MOORE
One Chase Manhattan Plaza
57th Floor
New York, N.Y. 10005
(212) 422-3000

GROVER G. HANKINS
CHARLES E. CARTER
NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF
COLORED PEOPLE
186 Remsen Street
Brooklyn, N.Y. 11201
(718) 858-0800

Attorneys for Amici Curiae

AMICUS CURIAE

BRIEF

Nos. 84-1656 and 84-1999

Supreme Court, U.S.
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JOSEPH F. SPANIO, JR.,
CLERK

In The
Supreme Court of the United States
October Term, 1985

— 0 —
LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, et al.,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,
Respondents.

— 0 —
LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, et al.,
Respondents.

— 0 —
**On Writs of Certiorari to the United States
Courts of Appeals for the Second and Sixth Circuits**

— 0 —
**BRIEF OF THE STATES OF CALIFORNIA, LOUISIANA,
MICHIGAN, MINNESOTA, NEBRASKA, NEW JERSEY,
NEW MEXICO, OREGON, WEST VIRGINIA, WISCONSIN,
AND THE PENNSYLVANIA HUMAN RELATIONS COMMISSION
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

— 0 —
JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
MARIAN M. JOHNSTON
Deputy Attorney General
Counsel of Record
350 McAllister St., Room 6000
San Francisco, CA 94102
Telephone: (415) 557-3991
Counsel for Amici Curiae

January 24, 1986

(List of Additional Counsel on Inside Cover)

William J. Guste, Jr.
Attorney General of Louisiana
2-3-4 Loyola Building, 7th Floor
New Orleans, Louisiana 70112
Telephone: (504) 568-5575

Frank J. Kelley
Attorney General of Michigan
525 West Ottawa St.
Law Building
Lansing, Michigan 48913
Telephone: (313) 256-2557

Hubert H. Humphrey, III
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155
Telephone: (612) 296-7580

Robert M. Spire
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
Telephone: (402) 471-2682

W. Cary Edwards
Attorney General of
New Jersey
Hughes Justice Complex
CN 112
Trenton, NJ 08625
Telephone: (201) 648-3441

Paul Bardacke
Attorney General of
New Mexico
P.O. Drawer 1508
Bataan Memorial Bldg.
Santa Fe, New Mexico 87504
Telephone: (505) 827-6000

David Frohnmayer
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-6002

Charles G. Brown
Attorney General of
West Virginia
State Capitol
Charleston, West Virginia 25305
Telephone: (304) 348-2021

Bronson C. La Follette
Attorney General of Wisconsin
P.O. Box 7857
Madison, Wisconsin 53707
Telephone: (608) 266-1221

Elisabeth S. Shuster
General Counsel
Pennsylvania Human
Relations Commission
P.O. Box 3145
Harrisburg, Pennsylvania 17105
Telephone: (717) 787-4410

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INTEREST OF AMICI CURIAE

Amici States and the Pennsylvania Human Relations Commission respectfully submit this brief in support of respondents. Amici urge this Court to affirm the decisions below, and thus affirm that court orders and other governmental action approving, mandating, or enforcing bona fide affirmative action plans are both lawful under Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), and constitutional under the equal protection guarantees of the Fifth and Fourteenth Amendments.

Amici's interest in these cases stems both from their interest in preserving the right of public employers to take appropriate steps to eliminate the effects of past discrimination within their own workforce and their interest in ensuring the effective enforcement of federal and state laws forbidding employment discrimination. Many of amici have themselves engaged in affirmative action to correct past discrimination.¹ Many of amici have also enforced affirmative action programs to redress employment discrimination which violates federal and state employment discrimination laws.² All of amici wish to preserve gov-

1. See, e.g., *La Riviere v. Equal Employment Opportunity Commission*, 682 F.2d 1275 (9th Cir. 1982), approving a voluntary affirmative action program designed to eliminate the effects of past gender-based discrimination in the California Highway Patrol. See also *Chmill v. City of Pittsburgh*, 488 Pa. 470, 412 A.2d 860 (1980), upholding a voluntary affirmative action plan adopted by the Pittsburgh Civil Service Commission to help remedy past racial discrimination by the Pittsburgh Bureau of Fire, and *Local 526-M, Michigan Corrections Organization, etc. v. State of Michigan*, 110 Mich. App. 546, 313 N.W.2d 143 (1981), rejecting constitutional challenge to affirmative action plan.

2. See, e.g., *Department of Fair Employment and Housing v. City and County of San Francisco*, FEHC Dec. No. 82-11 (1982-83 CEB 5), appeal pending, ordering Fire Department of San Francisco to engage in an affirmative action program to remedy past race discrimination in promotions.

ernmental use of bona fide affirmative action plans to remedy past employment discrimination.

In amici's experience, the goals and timetables established by affirmative action plans have proven to be an effective means of eradicating the effects of past discrimination, particularly for jobs which have been historically segregated or for employers which have resisted voluntary efforts to integrate their work-force. Affirmative action efforts are frequently necessary if equal employment opportunity is to become a reality for this generation of employees, and not merely the goal for future generations who may benefit from the mere elimination of discriminatory practices.

Amici will address the lawfulness of court-ordered and/or court-approved affirmative action plans to remedy the effects of past employment discrimination. Since similar statutory and constitutional challenges to the legality of such plans are raised in Nos. 84-1656 and 84-1999, amici submit this one brief for consideration in both cases.

The State of California, through its Attorney General John K. Van de Kamp, and the other Amici States through their Attorneys General, therefore submit this brief pursuant to Supreme Court Rule 36.4. Amicus Pennsylvania Human Relations Commission files this brief with the consent of the parties pursuant to Supreme Court Rule 36.2.

SUMMARY OF ARGUMENT

Bona fide affirmative action plans, establishing goals and timetables to eliminate the effects of past discrimination, are lawful and necessary remedies for unlawful employment discrimination. Courts may approve, impose, or enforce such plans consistent with statutory and con-

stitutional guarantees, and the beneficial results of bona fide affirmative action efforts move the work force closer to the goal of equal employment opportunity for all.

In this brief, amici address the propriety of goals and timetables as a remedy under § 706(g) of Title VII, whether such a remedy is voluntarily adopted and included in a court-approved consent decree,³ or is imposed by a court after a finding of past discrimination.⁴ Affirmative action plans further Title VII's goal of eradicating employment discrimination, and are permissible remedies under § 706(g) of Title VII.

Furthermore, amici will demonstrate that governmental involvement in race-conscious affirmative action plans, whether such involvement results from court action or from voluntary action by public employers, is consistent with the constitutional guarantee of equal protection.⁵ So long

3. No. 84-1999 involves court approval of an affirmative action plan in a consent decree resolving a Title VII action alleging race discrimination by a public employer against minority firefighters (*Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), cert. granted sub nom. *Local Number 93, International Association of Firefighters, AFL-CIO, C.I.O. v. City of Cleveland*, — U.S. — [106 S.Ct. 59] (1985) (No. 84-1999)). Petitioner therein, joined by the United States Department of Justice, argues that § 706(g) of Title VII prohibits court approval of such a plan.

4. No. 84-1656 involves a court-ordered affirmative action plan after a judicial finding of unlawful discrimination by a union (*Equal Employment Opportunity Commission v. Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l. Ass'n.*, 753 F.2d 1172 (2d Cir. 1985), cert. granted sub nom. *Local 28 of the Sheet Metal Workers' Int'l. Ass'n. v. Equal Employment Opportunity Commission*, — U.S. — [106 S.Ct. 58] (1985) (No. 84-1656)). Petitioners therein, again joined by the United States Department of Justice, argue that § 706(e) of Title VII prohibits courts from ordering the adoption of race-conscious affirmative action plans.

5. Nos. 84-1656 and 84-1999 raise equal protection objections to the affirmative action plans at issue in the respective cases. Petitioners in No. 84-1656, joined by the Justice Depart-

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as affirmative action plans are carefully structured to undo the effects of past discrimination, and satisfy the guidelines for bona fide plans which this Court enunciated in *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208-209 (1979) and *Fullilove v. Klutznick*, 448 U.S. 448, 490-492 (1980) (Burger, C.J., with White, and Powell, JJ.) and 520-521 (conc. by Marshall, J., with Brennan and Blackmun, JJ.), equal protection guarantees are satisfied.

ARGUMENT

I. TITLE VII PERMITS COURTS TO APPROVE, IMPOSE, OR ENFORCE AFFIRMATIVE ACTION PLANS TO REMEDY THE EFFECTS OF PAST EMPLOYMENT DISCRIMINATION.

A. Prospective Relief Has Long Been Recognized As an Appropriate Means of Eliminating the Effects of Past Discrimination.

In *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), this Court held that Title VII does not prohibit voluntary bona fide affirmative action plans according racial preferences in order to eliminate traditional patterns of racial segregation, stating that "... Congress chose not to forbid all voluntary race-conscious affirmative action." (*Id.*, at 206). However, *Weber* did not address "what a court might order to remedy a past proved violation of the Act." (*Id.*, at 200).⁶

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ment, argue that court-ordered affirmative action offends equal protection, and petitioner in No. 84-1999 argues that the consent decree denies non-minorities equal protection. The Justice Department also suggests in a footnote that the relief awarded in No. 84-1999 is unconstitutional.

6. *Weber* also did not address equal protection implications which arise if public employers adopt affirmative action

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During the more than 20 years that Title VII has been in existence, however, the judicial enforcement provision of the Act has been widely understood as permitting courts to order race-conscious affirmative action which operates prospectively to eliminate the effects of past discrimination, in addition to make-whole relief to individual victims of discrimination. The prospective relief which benefits the class victimized by discrimination, plus the make-whole relief to identified individuals, serve, respectively, "the central statutory purposes [of Title VII] of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." (*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

The judicial authority provision of Title VII, § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (hereinafter § 706(g)), is certainly broad enough to support an order requiring prospective affirmative action. It provides, in pertinent part, that a "court may . . . order such affirmative action as may be appropriate, . . . or any other equitable relief as the court deems appropriate." Pursuant to this statutory authority, "federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of § 707(a) [of Title VII, 42 U.S.C. § 2000e-6(a)] eliminate their discriminatory practices and the effects there-

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plans (*Weber*, 443 U.S. at 200), but, as a statutory matter, public and private employers are equally subject to Title VII. Non-federal public employers are included within the statutory definition of "employer" (§ 701(b) of Title VII, 42 U.S.C. § 2000e(b)), except for political officers and their immediate staff (§ 701(f) of Title VII, 42 U.S.C. § 2000e(f)), and federal employees are also protected (§ 717 of Title VII, 42 U.S.C. § 2000e-16). As discussed *infra*, constitutional equal protection concerns also do not prohibit race-conscious remedial plans.

from." (*International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 n. 47 (1977)).

Eliminating the effects of discriminatory practices is unquestionably one of the goals of Title VII. As stated in *Albemarle*, 422 U.S. at 418:

"Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar discrimination in the future' [Citation.]"

See also *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770 (1976), and *Teamsters*, 431 U.S. at 364, quoting this portion of *Albemarle*.

Absent any affirmative efforts, the mere ending of discriminatory practices will do little to assist the present generation of employees who have been victimized by discrimination. If the effects of past discrimination are left to be dissipated by time alone, the right to full equality in employment opportunity will remain only a goal, and not a reality, for many years to come. As Justice Marshall observed in *Regents of the University of California v. Bakke*, 438 U.S. 265, 395-396 (1978) (Marshall, J., concurring and dissenting):

"The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

"In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society."

The early school desegregation cases confirm that the mere ending of discriminatory practices is often an incomplete remedy, and that race-conscious plans may be necessary to remedy the effects of past discrimination. As stated in *Green v. County School Board of New Kent County*, 391 U.S. 430, 437-438 (1968):

"School boards . . . were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

Similarly, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971), the Court said:

"'Racially neutral' . . . plans may fail to counteract the continuing effects of past school segregation. . . ."

And as stated in a companion case approving a race-conscious student assignment plan, *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971):

"Any other approach would freeze the status quo that is the very target of all desegregation processes."

The purposes of Title VII are similarly frustrated by practices which "operate to 'freeze' the status quo of prior discriminatory employment practices." (*Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

As noted above, the language of § 706(g) is certainly broad enough to encompass an award of prospective affirmative action. Courts' authority under § 706(g) has always been described as broad equitable discretion to correct "a historic evil of national proportions." (*Albemarle*, 422 U.S. at 416). As further explained in *Albemarle*, 422 U.S. at 418:

". . . Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice.' . . ."

See also *Franks*, 424 U.S. at 764, and *Teamsters*, 431 U.S. at 361 n.47.

The equity powers of the courts have long been relied upon in school cases to implement race-conscious plans. In *United States v. Montgomery County Board of Education*, 395 U.S. 225, 227 (1969), where the Court approved a district court order which, among other relief ordered, established a ratio for white to minority faculty, the Court explained that district courts are "to be guided by traditional equitable flexibility to shape remedies in order to adjust and reconcile public and private needs." As further explained in *Swann v. Charlotte-Mecklenburg*, 402 U.S. at 15:

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

Relying on the broad equitable authority granted courts by § 706(g), a multitude of courts, including this Court, have approved race-conscious plans providing prospective relief to a class, once a pattern or practice of discrimination against that class is shown. Make-whole relief for individual members of that class may require a showing of actual injury, but such evidence has never been required for class-wide prospective relief. In *Teamsters*, this Court noted, with apparent approval, a consent decree which, *inter alia*, obligated the employer to hire one minority person for every white person hired until work force parity was attained (*Id.*, 431 U.S. at 330 n.4). As the Court explained:

"[A] court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order

that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights' protected by Title VII.⁷" (*Id.*, at 361).

Footnote 47 in the above quotation described the authority of federal courts to order prospective relief.

Numerous decisions by appellate and district courts have similarly awarded or approved affirmative action plans which operate prospectively to eliminate the vestiges of past discrimination.⁷ While these cases are too numerous to attempt a comprehensive listing herein, the Court is certainly aware of the plethora of opinions and consent decrees and can take notice that any determination that such plans violate rather than remedy Title VII will cause an immense upheaval.

This Court and lower federal courts have thus consistently approved consent decrees which include affirmative action plans, and federal appellate and district courts have frequently imposed such plans as part of the relief ordered in Title VII cases. In light of the broad equitable power granted to courts under § 706(g), the consistent use of this discretionary equitable power to adopt or impose affirmative action plans, and the continuing need to

7. "In Title VII class-action suits, the Courts of Appeals are unanimously of the view that race-conscious affirmative relief can also be 'appropriate' under § 706(g).¹⁰" (*Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, —, [104 S.Ct. 2576, 2606] (1984) (Blackmun, J., dissenting, with Brennan and Marshall JJ.). Footnote 10 in the above quotation provides citations to opinions from each circuit approving the use of affirmative action remedies in Title VII pattern or practice cases. See also Spiegelman, *Court-Ordered Hiring Quotas after Stotts: A Narrative etc.*, 20 Harv. C.R.-C.L. L.Rev. 339, 345 and n. 15 (1985) ("[T]he courts of appeals in over fifty cases have upheld quotas as remedies for adjudicated violations of the Act.")

eliminate the residual effects of past discrimination, which is one of the central purposes of Title VII, § 706(g) should continue to be interpreted as authorizing courts to award all appropriate relief, including, where necessary, affirmative action plans.

B. Nothing in *Stotts* Requires This Court To Reverse the Widely-Accepted Understanding of § 706(g).

Despite the long-held understanding that appropriate Title VII remedies include bona fide affirmative action plans establishing goals and timetables which operate prospectively to undo the effects of past discrimination, petitioners, joined by the United States Department of Justice, argue that this remedy now violates Title VII. The basis for this argument is one sentence taken from this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 [104 S.Ct. 2576] (1984).

In *Stotts*, the Court, relying on *Franks*, 424 U.S. at 764-766, and *Teamsters*, 431 U.S. at 367-371, ruled that while individual victims of discrimination may be awarded make-whole relief, including retroactive, competitive seniority, "mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." (*Stotts*, 104 S.Ct. at 2588).

While *Stotts* dealt solely with a district court's authority under § 706(g) to override bona fide seniority systems, the decision further states that the policy behind § 706(g) is "to provide make-whole relief only to those who have been actual victims of illegal discrimination, . . ." (*Stotts*, 104 S.Ct. at 2589). Petitioners and supporting amici seek to transform this sentence into a limitation of not merely make-whole retroactive relief, but also of any prospective relief in the form of goals and time-

tables for hiring or promoting members of the victimized class.

While the impact of *Stotts* on affirmative action plans is, of course, an issue only this Court can decide, the interpretation urged by petitioners and supporting amici is contrary to that given *Stotts* by every circuit court which has addressed this question. Furthermore, petitioners' overbroad interpretation undercuts the effectiveness of Title VII as a statute designed to eliminate the effects of past discrimination.

If *Stotts* means that voluntary consent decrees may not include affirmative action provisions, the illogical result would be that plans lawful under *Weber* somehow become unlawful when approved by courts. As stated in *Deveraux v. Geary*, 765 F.2d 268, 274 (1st Cir. 1985), pet. for cert. filed, 54 U.S.L.W. 3229 (Sept. 19, 1985) (No. 85-492):

"The expansive reading of *Stotts* urged by [non-minority employees objecting to an affirmative action consent decree] would require us to find that *Stotts* overruled *Weber* *sub silentio*. In view of the importance of any such action, it seems likely that the Court would have directly addressed *Weber* if it had intended to overrule that decision. All the circuits considering the issue have concluded in the absence of any express pronouncement to the contrary, that *Weber* remains good law."⁸

8. Decisions which, like *Deveraux*, approve affirmative action consent decrees and reject the "argument that the *Stotts* Court meant to rewrite Title VII law to make all affirmative action plans improper absent a finding of actual past discrimination" (*Deveraux*, 765 F.2d at 271) include, in addition to one of the two decisions at issue herein, *Vanguards*, 753 F.2d at 488 n. 7 ("[T]o apply *Stotts* to voluntary employer plans would mean that all such plans are impermissible under title VII no matter how reasonable. This reading of *Stotts* is directly contrary to *Weber*."); *Massachusetts Ass'n. of Afro-American Police, Inc. v. Boston Police Department*, — F.2d —, (1st Cir. Dec. 20, 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911

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Furthermore, if *Stotts* forbids court-imposed affirmative action remedies for proven violations of Title VII, then courts, despite their broad equitable powers, are absurdly denied perhaps the most effective means of eliminating discriminatory effects. *Stotts* prohibits courts from disturbing seniority plans, except where necessary to provide complete relief to individual victims of discrimination, but *Stotts* has no effect on court-imposed affirmative action plans which merely provide prospective classwide relief, and do not adversely affect vested seniority rights.⁹

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(3d Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 782] (1985); *United States v. City of Cincinnati*, 771 F.2d 161, 168 (6th Cir. 1985) ("Stotts did not control this [non-seniority] issue."); *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir. 1984) ("[H]ere we deal with a remedy applied voluntarily by a public employer at the point of hiring. Thus contrary to the facts of *Stotts*, no employees with vested seniority rights were deprived of them."); *Britton v. South Bend Community School Corp.*, 775 F.2d 794, 808 (7th Cir. 1985) ("Unlike *Stotts*, there is no override of a bona fide seniority plan. . . . *Stotts* did not even purport to, much less actually, overrule *Weber*."); *Grann v. City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 296] (1984) (" . . . *Stotts* involved seniority rights, which cannot be awarded to one employee without adversely affecting the rights of other employees, while the male detectives here lost nothing when the city remedied the discrimination against women."); *Paradise v. Prescott*, 767 F.2d 1514, 1528 (11th Cir. 1985) ("[T]he central issue in [*Stotts*] concerned the district court's authority to override a bona fide seniority system to require layoffs of more senior whites, in the absence of a showing of intentional discrimination. Here, the order under review involves promotions, not layoffs pursuant to a bona fide seniority system."); and *Turner v. Orr*, 759 F.2d 817, 824 (11th Cir. 1985), pet. for cert. filed, 54 U.S.L.W. 3086 (July 31, 1985) (No. 85-177) ("[A] primary basis of the Supreme Court's holding in *Stotts* is that the district court's order required the city to violate the provisions of a bona fide seniority system.").

9. Decisions rejecting the applicability of *Stotts* to court-imposed affirmative action remedies which do not affect vested seniority rights include, in addition to the other decision at issue herein, *Local 638 v. Local 28*, 753 F.2d at 1186 ("In our case § 703(h) is not involved because there is no seniority plan in

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Bona fide seniority systems have long been recognized to be beyond the reach of Title VII remedies, absent proof that individual persons have been victims of discriminatory employment practices. Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides that such plans are not unlawful, and prior decisions of this Court have held that such plans do not violate Title VII even though they may perpetuate the effects of past discrimination (*Franks*, 424 U.S. at 761). As stated in *Teamsters*, 431 U.S. at 349, where the Court held that bona fide seniority systems were immune from the *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), analysis of unlawful discriminatory effect:

"Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale."

Nevertheless, neither § 703(h) of Title VII nor the expectations of other innocent employees bar courts from approving or awarding make-whole relief, including retroactive seniority, to individual victims (*Franks*, at 774-775, and *Teamsters*, at 347). The lower court's errors in *Stotts* were to fail to limit seniority awards to individual discriminatees and to attempt to override a seniority system merely to eliminate discriminatory effects. As explained in *Stotts*, 104 S.Ct. at 2588:

"The difficulty with this approach is that it overstates the authority of the trial court to disregard a seniority system in fashioning a remedy after

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conflict with the remedies imposed by AAAPO or the fund order."), *United States v. City of Buffalo*, — F.2d — (2d Cir. Dec. 19, 1985) ("[T]he decree in this case does not conflict with a seniority plan protected by § 706(h) [sic] . . ."), and *Diaz v. American Tel. & Tel.*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985).

a plaintiff has successfully proved that an employer has followed a pattern or practice having a discriminatory effect on black applicants or employees."

Stotts has no effect, however, on a trial court's authority to fashion relief which does not intrude on seniority rights. Affirmative action goals and timetables, whether adopted in a voluntary consent decree or imposed as a court remedy, are an effective means of eradicating the vestiges of discrimination. Title VII's remedial provision, § 706(g), should therefore be construed so as to permit affirmative action plans¹⁰ and thus permit the goal of equal employment opportunity to become a reality within the foreseeable future.

II. COURT ORDERS WHICH APPROVE, IMPOSE, OR ENFORCE AFFIRMATIVE ACTION PLANS ARE CONSTITUTIONALLY PERMISSIBLE

Race-conscious plans have long been recognized as a legitimate means to eliminate the effects of past discrimination, and this Court has consistently held that governmental classifications on the basis of race are not unconstitutional *per se*. Such classifications must, of course, be scrutinized under the equal protection guarantees

10. Since affirmative action plans which do not affect the bona fide seniority rights protected by § 703(h) of Title VII are appropriate under § 706(g) either as consent decrees or as court-imposed mandates, this Court need not decide whether district courts may ever approve consent decrees which they have no authority to order as a remedy. Furthermore, affirmative action plans embodied in either voluntary consent decrees or court-imposed orders are also permissible under § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j). This section means only that employers are not required to grant racial preferences merely because of racially imbalanced work forces, not that racial preferences are prohibited (*Weber*, 443 U.S. at 205-206).

established by the Fourteenth Amendment and the equal protection component of the Fifth Amendment,¹¹ but racial classifications by the government are constitutional so long as they are justified by, and necessary for the achievement of, a sufficiently important governmental interest. The most recent reaffirmation of this principle is found in *Palmore v. Sidoti*, 466 U.S. 429, — [104 S.Ct. 1879, 1882] (1984), in which this Court, in holding that private prejudice did not justify racial classifications divesting a natural mother of custody of her child, unanimously stated:

"[Racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of its legitimate purpose [citations omitted]."

Similarly, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), where this Court upheld the federal statute setting aside for minority-owned businesses a percentage of federal funds granted to public works projects, the Court rejected the contentions that all racial classifications by the government are unconstitutional and that governmental actions must be "color-blind". As stated in the opinion announcing the judgment of the Court:

11. Court orders such as those at issue in the instant case are, of course, governmental action and thus subject to scrutiny under equal protection guarantees. The Fourteenth Amendment governs racial classifications by state courts (*Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948); *Palmore v. Sidoti*, 466 U.S. 429, — n. 1 [104 S.Ct. 1879, 1881-1882 n. 1] (1984)). The Due Process Clause of the Fifth Amendment includes an equal protection component imposing similar standards on actions of the federal government (*Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980)), including federal courts (*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 19 (1971)).

"Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." (448 U.S. at 491) (Burger, C.J., joined by White and Powell, J.J.)

Other members of the Court agreed that racial classifications were permissible under the equal protection guarantees in appropriate situations. See *Fullilove*, 448 U.S. at 496 (Powell, J., concurring), and 448 U.S. at 517 (Marshall, J., concurring, joined by Brennan and Blackmun, J.J.)

Likewise, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a majority of the members of this Court approved, in principle, the adoption of race-conscious affirmative action plans by governmental entities. In announcing the judgment of the Court, Justice Powell stated that state racial classifications are constitutionally permissible if the state shows a substantial purpose or interest, and the use of racial classifications is necessary to accomplish that purpose or safeguard that interest (438 U.S. at 305). As other members stated:

"[R]acial classifications are not *per se* invalid under the Fourteenth Amendment." (438 U.S. at 356) (Brennan, J., concurring and dissenting, joined by White, Marshall, and Blackmun, J.J.).

The use of racial classifications by courts to remedy past discrimination has also long been recognized as both necessary and constitutional in school desegregation cases. In *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Davis v. Board of School Comm'rs. of Mobile County*, 402 U.S. 33 (1971), the Court approved a variety of race-conscious remedies

imposed by federal courts to correct historic discrimination in public schools.

Furthermore, while recent decisions of this Court have declined to address the constitutionality of governmental affirmative action as a remedy for employment discrimination,¹² school desegregation cases have approved court-imposed racial classifications of teachers and staff to achieve racial balance among schools. In *United States v. Montgomery County Board of Education*, 395 U.S. at 232-236, granting the request of petitioner United States, the Court directed the affirmance of a district court order desegregating the faculty and staff of a public school system. The district court judge had ordered the board of education to move towards a goal of a ratio of black and white faculty in each school which was substantially the same as existed throughout the system. The order set out a schedule to achieve this goal, specifying a minimum number of minority teachers to be assigned full-time to each school during the next school year, and a ratio of minority substitute, student, and night school teachers. See also *Davis v. Board of School Comm'rs. of Mobile County*, 402 U.S. at 35, and *Milliken v. Bradley*, 433 U.S. 267, 283 (1977).

As explained in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 19:

12. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 200 (1979), did not involve governmental action, and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, — [104 S.Ct. 2576, 2585] (1984), only addressed a court's authority to override a bona fide seniority system, not affirmative action plans which do not interfere with seniority rights.

"[T]he Mobile school board has argued that the Constitution requires that teachers be assigned on a 'color blind' basis. It also argues that the Constitution prohibits district courts from using their equity powers to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention."

While this Court has declined to review this position in recent employment discrimination decisions, many recent decisions by each circuit court of appeals, in affirming the use of affirmative action programs, have necessarily rejected any contention that such programs violate equal protection guarantees either when adopted by a public employer or approved by court order.¹³ Unless each of

13. See, e.g., *Deveraux v. Geary*, 765 F.2d 268, 274-275 n.5 (1st Cir. 1985), pet. for cert. filed, 54 U.S.L.W. 3229 (Sept. 19, 1985) (No. 85-492) ("[W]e adhere to the precedent upholding the validity of voluntary affirmative action programs instituted by public employers."); *Bush v. New York State Civ. Serv. Comm'n.*, 733 F.2d 220, 227 n.8 (2d Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 803] (1985); *Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117, 1120 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 900-904 (3d Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 782] (1985); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 274 (4th Cir. 1976), cert. denied, 429 U.S. 920 (1976); *Williams v. City of New Orleans*, 729 F.2d 1554, 1560-1561 (5th Cir. 1984); *United States v. City of Miami*, 664 F.2d 435, 442 (5th Cir. 1981) ("A consent decree may properly include provisions requiring the defendant to take affirmative action rectifying the effects of past discrimination."); *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir. 1984) ("[A]gainst the long history of the patent racially discriminatory hiring record of the Detroit Fire Department 'the voluntary race-conscious affirmative action plan' . . . did not violate any applicable federal constitutional or statutory provision."); *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1155-1157 (6th Cir. 1984), cert. granted, — U.S. — [105 S.Ct. 2015] (1985); *Bratton v. City of Detroit*, 704 F.2d 878, 885-896 (6th Cir. 1983), mod. 712 F.2d 222 (1983), cert. denied, 464 U.S. 1030 (1984); *Britton v. South Bend Community*

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these circuits has misread the import of *Bakke* and *Fullilove*, and has misunderstood the history of cases approving race-conscious remedies to eradicate school segregation, these decisions correctly determine that both courts and public employers may, consistent with equal protection guarantees, utilize affirmative action plans to eliminate the effects of past employment discrimination.

A determination that affirmative action plans involving governmental action are not *per se* violations of equal protection does not, of course, mean that all such plans are bona fide and will survive constitutional scrutiny. The standard of review applicable to governmental efforts to undo the effects of past racial discrimination in employment has not been definitively established by this Court, but recent cases do establish that even though racial classifications are designed to correct past discrimination, such classifications will be closely monitored by the courts to ensure that the government's interest in implementing affirmative action is sufficiently strong and that the plan

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School Corp., 775 F.2d 794, 801 (7th Cir. 1985) ("The Supreme Court has consistently held that a governmental body may use race-conscious plans to eradicate the effects of past discrimination."); *Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 561 (7th Cir. 1984), pet. for cert. filed, 53 U.S.L.W. 3896 (June 10, 1985) (No. 84-1936); *Warsocki v. City of Omaha*, 726 F.2d 1358, 1360 (8th Cir. 1984); *Setser v. Novack Investment Co.*, 657 F.2d 962, 965-966 n.2 (8th Cir. 1981) (en banc), cert. denied, 454 U.S. 1064 (1981); *Johnson v. Transportation Agency, Santa Clara County*, 770 F.2d 752, 756 (9th Cir. 1985); *La Riviere v. Equal Employment Opportunity Commission*, 682 F.2d 1275, 1280 (9th Cir. 1982); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (10th Cir. 1979); *Paradise v. Prescott*, 767 F.2d 1514, 1530 (11th Cir. 1985); and *Segar v. Smith*, 738 F.2d 1249, 1293-1294 (D.C. Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 2357] (1985).

is carefully and narrowly drawn so as to be sufficiently related to the plan's purpose.

In *Bakke*, where a majority of members of this Court agreed that appropriate race-conscious affirmative action efforts by governmental entities do not violate equal protection guarantees, four Justices opined that racial classifications which are drawn for remedial purposes need not be subjected to the same strict scrutiny analysis applicable to racial classifications which are drawn to stigmatize or which are based upon racial hatred or prejudice. Instead of requiring that remedial racial classifications be necessary to further a compelling governmental interest, with no less restrictive alternatives available, these Justices concluded that "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" (*Bakke*, 438 U.S. at 359) (Brennan, J., concurring and dissenting, joined by White, Marshall, and Blackmun, JJ.). Justice Powell, whose opinion announced the judgment of the Court, applied the same strict scrutiny test applicable to other racial classifications, requiring that "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.'" (*Id.*, at 305).¹⁴

In *Fullilove*, the Court similarly failed to have a majority of Justices clarify the applicable standard of review.

14. The opinion of the other four Justices did not address the constitutional issue. (*Bakke*, 438 U.S. at 412) (Stevens, J., concurring and dissenting, joined by Burger, C.J., and Stewart and Rehnquist, JJ.).

Three Justices held that they need not adopt either of the analyses articulated in *Bakke*, since the statute in question would survive scrutiny under either test (*Fullilove*, 448 U.S. at 492) (Burger, C.J., joined by White and Powell, JJ.), while three other Justices relied on their opinion in *Bakke* to hold that the appropriate test is "whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." (*Fullilove*, 448 U.S. at 519) (Marshall, J., joined by Brennan and Blackmun, JJ.).

Most recently, in *Palmore v. Sidoti*, the Court did unanimously apply strict scrutiny to a racial classification, but the classification at issue was based upon private prejudice, not a remedial purpose. Nevertheless, the language in that decision arguably means that this Court will conclude that strict scrutiny is always the applicable test. As stated therein:

"A core purpose of the Fourteenth Amendment was to do away with all governmentally-imposed discrimination based on race. [Citation.] Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. [Citation.] Such classifications are subject to the most exacting scrutiny; . . ." (*Id.*, 104 S.Ct. at 1881-1882) (footnote omitted).

Whether the applicable standard of review is traditional strict scrutiny or a less rigorous analysis, bona fide affirmative action plans are nonetheless constitutional so long as the plans satisfy the guidelines described by this Court in approving race-conscious remedial plans. If affirmative action plans are carefully drawn to eliminate

the effects of past discrimination, then they will "survive judicial review under either 'test'" (*Fullilove*, 448 U.S. at 492) (Burger, C.J., joined by White and Powell, JJ.).

III. AFFIRMATIVE ACTION PROGRAMS FURTHER THIS NATION'S GOAL OF ERADICATING ALL EFFECTS OF PAST DISCRIMINATION.

This country has established the goal of achieving full equality in employment opportunity, but this goal will not be attained, or even approached, within a reasonable period of time unless efforts are made in both the private and public sectors to undo the effects of years of discrimination. Eliminating past discriminatory effects in employment is, of course, one of Title VII's primary purposes (*Albemarle*, 422 U.S. at 418 and 421; *Franks*, 424 U.S. at 770; and *Teamsters*, 431 U.S. at 364).

As discussed above, affirmative action remedies for Title VII have been approved by every circuit court. Affirmative action plans have also been required or approved by numerous federal and state governmental entities as an effective means to eliminate the effects of past discrimination and attain full equality.¹⁵

15. Federal affirmative action efforts, in addition to the public works program approved in *Fullilove*, include Executive Order 11246, 30 Fed. Reg. 12319 (1965) and 41 C.F.R. Parts 60-2 and 60-4 (1985) (federal contractors); Executive Order 11478, 34 Fed. Reg. 12985 (1969) (federal employees); and EEOC Guidelines on Affirmative Action, 29 C.F.R. Part 1608 (1985) (Title VII employers).

Almost every state has statutes, regulations, or executive orders requiring affirmative action efforts to correct the effects of

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Affirmative action plans have won widespread approval from both courts and other governmental entities because such plans are both necessary and effective. Affirmative action efforts have proven their value.

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past discrimination. See Alaska Stat. §§ 44.19.444-44.19.445 (1985), and Alaska Admin. Order No. 59, reported in 8A Fair Emp. Prac. Man. (BNA) 453:225; Arizona Exec. Order No. 83-5, reported in 8A Fair Emp. Prac. Man. (BNA) 453:436; Cal. Gov't Code §§ 19400-19406, 19790-19798 (West 1980), Cal. Exec. Orders Nos. B-85-81 and D-20-83, reported in 8A Fair Emp. Prac. Man. (BNA) 453:853, and Cal. Admin. Code tit. 2, Rule 7286.8, reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:862; Colo. Exec. Order dated April 16, 1975, reported in 8A Fair Emp. Prac. Man. (BNA) 453:1036, Colo. Admin. Code (4 CCR) § 1-6-1, reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1039, Colo. Admin. Code (4 CCR) §§ 5-2-4 and 5-6-1 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1105, Colo. Admin. Code (3 CCR) § 80.9, reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1128, and Colo. Admin. Code (3 CCR) § 90.13, reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1157; Conn. Gen. Stat. Ann. § 46a-68 (West Supp. 1985), and Conn. Exec. Order No. 9, reported in 8A Fair Emp. Prac. Man. (BNA) 453:1246; Del. Exec. Orders Nos. 74 and 81, reported in 8A Fair Emp. Prac. Man. (BNA) 453:1446; D.C. Code § 1-2524 (1981), D.C. Code §§ 1-507 - 1-514 and 1-1141 - 1-1151 (1981); Fla. Stat. Ann. § 110.112 (West 1982), and Fla. Exec. Order No. 79-50, reported in 8A Fair Emp. Prac. Man. (BNA) 453:1827; Ga. Exec. Order dated July 29, 1976, reported in 8A Fair Emp. Prac. Man. (BNA) 453:2051; Hawaii Exec. Order No. 77-4 and Admin. Directive 80-2, reported in 8A Fair Emp. Prac. Man. (BNA) 453:2259, and Hawaii Equal Employment Opportunity Regulations §§ 12-31-1 - 12-31-7, reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:2351; Ill. Ann. Stat. ch. 68, §§ 2-105 and 7-105 (Smith-Hurd Supp. 1985), Ill. Ann. Stat. ch. 127, §§ 63b and 119b (Smith-Hurd Supp. 1985), 56 Ill. Admin. Code 2520, Subpart G, and 44 Ill. Admin. Code 750, Subpart C; Ind. Code Ann. §§ 4-15-12-1 et seq. (Burns Supp. 1985); Iowa Admin. Code § 240, Chapters 2.13 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:3091, and Iowa Admin. Code § 240, Chapters 20.1 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:3151; Kan. Admin. Regs. 21-30-14 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:3306; Ky. Rev. Stat. §§ 45.550-45.640 (1980), and Ky. Exec. Orders Nos. 80-106 and 84-549, reported in 8A Fair Emp. Prac.

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"During the 1970's, the U.S. Commission on Civil Rights released studies approving affirmative action and documenting employment gains for blacks in industries adopting affirmative action." (Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones*

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Man. (BNA) 455:74; Me. Rev. Stat. Ann. tit. 5, §§ 781-790 (1979); Md. Ann. Code art. 78A, § 7A (1977), and Md. Exec. Order dated December 9, 1970 (Code of Maryland Register 01.01.1976.05), reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:655; Mass. Exec. Orders Nos. 227 and 237, reported in 8A Fair Emp. Prac. Man. (BNA) 455:883-884, and Mass. Equal Employment Opportunity Anti-Discrimination and Affirmative Action Program (Admin. Bul. 75-14), reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:961; Mich. Comp. Laws Ann. § 37.2210 (West 1985), Mich. Exec. Order 1983-4, reported in 8A Fair Emp. Prac. Man. (BNA) 455:1030, and Mich. Civil Rts. Div. directive dated April 1978, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1132; Minn. Stat. Ann. § 43A.19 (West Supp. 1985), and Minn. Dept. of Human Rights regulations, ch. 5000, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1301; Miss. State Personnel Board Manual of Policies, Rules 5.10 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1505; Mo. Exec. Order No. 82-27, reported in 8A Fair Emp. Prac. Man. (BNA) 455:1643, and Mo. Admin. Code (4 CSR) 180-3.080, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1715; Mont. Exec. Order No. 24-81, reported in 8A Fair Emp. Prac. Man. (BNA) 455:1845; Neb. Rev. Stat. §§ 81-1355 et seq. (1981), and Neb. Exec. Order dated June 16, 1978, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2048; Nev. Exec. Order dated February 22, 1983, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2226; N.H. Exec. Order 81-3, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2436, and N.H. State Plan for Equal Employment in Apprenticeship and Training, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:2531-2543; N.J. Stat. Ann. § 10:5-34 (West 1976), N.J. Stat. Ann. §§ 11:2D-1 et seq. (West Supp. 1985), N.J. Exec. Order No. 61, reported in 3 Empl. Prac. Guide (CCH) ¶ 25,722; N.M. Exec. Order 81-45, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2849, and N.M. Human Rts. Commission Regulations §§ XIII-XV, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:2880; N.Y. Exec. Law § 296 (12) (Consol. 1982), N.Y. Exec. Orders Nos. 6 and 21, reported in 8A Fair Emp. Prac. Man. (BNA) 455:3071-3072, and N.Y. Admin. Code tit. 9, § 466, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:3125; Ohio Rev. Code Ann. § 4112.04 (A)(10) (Baldwin Supp. 1979), Ohio Exec. Order dated September

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of *Equal Opportunity*, 69 Minn. L. Rev. 735, 803 (1985)).

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13, 1973, reported in 3 Empl. Prac. Guide (CCH) ¶ 26,715, Ohio Dept. of State Personnel Rules and Regulations, ch. 123: 1-49-01 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:231, Ohio Bureau of Equal Employment Opportunity for Construction Regulations, ch. 123: 2-3-01 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:282, and Ohio State Apprenticeship Council rules 4101: 1-5-02 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:307; Okla. Stat. Ann. tit. 74, § 840.25 (West Supp. 1985), and Okla. Exec. Order No. 79-14, reported in 8A Fair Emp. Prac. Man. (BNA) 457:425; Or. Rev. Stat. §§ 182.100, 243.305, 243.315, and 659.025 (1983), Or. Exec. Order 79-22, reported in 8A Fair Emp. Prac. Man. (BNA) 457:709, and Or. Admin. R. 839-11-200, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:693; Pa. Exec. Order 1984-1, reported in 3 Empl. Prac. Guide (CCH) ¶ 27,251, Regulations of Penn. Human Relations Commission §§ 49.51 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:889, Regulations of Penn. Dept. of Labor and Industry, Industrial Board, §§ 81.1 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:935, Affirmative Action Guidelines of the Penn. Human Relations Commission, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:851, and Penn. Employee Selection Guidelines § 15 (1 Pa. Admin. Bull. 2359 (1971)), reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:861; R.I. Exec. Order 85-11, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:1245; S.C. Code Ann. § 1-13-110 (Law. Co-op. Supp. 1984), and S.D. Admin. R. 65-20 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:1451; Tenn. Code Ann. § 4-21-306 (1985), and Tenn. Exec. Order No. 8, reported in 8A Fair Emp. Prac. Man. (BNA) 457:1865; Tex. Exec. Order MW-6, reported in 8A Fair Emp. Prac. Man. (BNA) 457:2007; Utah Exec. Order dated May 4, 1979, reported in 8A Fair Emp. Prac. Man. (BNA) 457:2218; Va. Exec. Order No. 1-82, reported in 8A Fair Emp. Prac. Man. (BNA) 457:2626; Wash. Exec. Order No. 84-10, reported in 8A Fair Emp. Prac. Man. (BNA) 457:2826, Wash. Rev. Code §§ 49.04.100-49.04.130 (1974), reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:2873, Wash. Admin. Code R. 168-08-298(4)(q), reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:2912, Wash. Admin. Code R. 168-18-010 - 168-18-100, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:2928a, and Wash. Admin. Code R. 296-04-300 - 296-04-480, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:2970; W. Va. Exec. Order 16-78, reported in 8A Fair Emp. Prac. Man. (BNA) 457:3026; Wis. Stat. Ann. §§ 16.765 and 230.01 et seq. (West Supp. 1985), and Wis. Exec. Orders Nos. 9, 26, and 28, reported in 8A Fair Emp. Prac. Man. (BNA) 457:3217-3218.

"Affirmative action programs have achieved the opening of jobs for blacks at other-than-menial levels and the creation of an appreciable black middle class. . . .

"Two studies released in 1983 concluded that blacks made 'greater gains in employment at those establishments contracting with the federal government—and thus subject to the OFCCP affirmative action requirements—than at non-contractor companies.' Major corporations . . . reported significant employment gains for minorities under affirmative action programs. Perhaps of even greater importance is a 1983 survey on affirmative action. In it, a number of major corporations reported that affirmative action had helped break down racial stereotypes, improved employee morale, streamlined personnel policies, and, at some companies, even expanded business. A concerted effort by the courts and administrative agencies to achieve affirmative action goals has contributed to these successes. Affirmative action programs have begun to achieve the goal of equal opportunities for all." (*Id.*, at 804-805) (footnotes omitted).

As further documented in Edwards, *Preferential Remedies and Affirmative Action in Employment in the Wake of Bakke*, 1979 Wash. U.L.Q. 113, 134 (1979), "preferential remedies do work."

Judicial decisions reviewing affirmative action programs have similarly concluded that such programs are effective means to eliminate vestiges of discrimination, and, moreover, necessary to achieve that goal. As Justice Blackmun stated in his separate opinion in *Bakke*:

"In order to get beyond racism, we must first take account of race. There is no other way." (438 U.S. at 407) (Blackmun, J., concurring and dissenting).

These sentiments were recently echoed in *United States v. City of Buffalo*, — F.2d —, — (2d Cir. Dec. 19, 1985), where the court said:

"[U]nless prospective relief were available the wrong could not, because of the inability to identify each of the victims, be remedied by 'make-whole' relief.

...

"[B]road discriminatory conduct demands equally broad prospective equitable relief. Otherwise the wrong will not be remedied."¹⁶

Of course in remedying any wrong, the remedy should only extend so far as necessary to reach the decided goal, and both Title VII and the equal protection guarantees require that affirmative action plans be appropriately limited so that full equality is achieved, but a new discriminatory system is not established. The Title VII guidelines set forth in *Weber*, 443 U.S. at 208, require that affirmative action plans be "designed to break down

16. Many other decisions have also discussed the necessity for according racial preferences to undo past discriminatory effects, including *Johnson v. Transportation Agency, Santa Clara County*, 770 F.2d 752, 759 (9th Cir. 1984) ("Affirmative action is necessary . . . to remedy long-standing imbalances in the work force."); *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982) ("There may be situations in which the carrot of a goal, or the stick of a required minimum, is necessary to encourage a dilatory or obstructive employer to end discrimination."); *Valentine v. Smith*, 654 F.2d 503, 509 (8th Cir. 1981), cert. denied, 454 U.S. 1124 (1981) ("Arkansas could not practically achieve its constitutionally permissible ends in the foreseeable future without the use of race-conscious remedies."); and *United States v. City of Miami*, 614 F.2d 1322, 1336 (5th Cir. 1981), mod. on other grds. 664 F.2d 435 (5th Cir. 1981) ("[A]ffirmative relief is required to ensure that the effects of past discrimination are negated.") (emphasis by court).

old patterns of racial segregation and hierarchy," "not unnecessarily trammel the interests of the white employees," not "create an absolute bar to the advancement of white employees," and be "a temporary measure."

The necessity for limiting affirmative action plans so as only to remedy past discrimination was also set forth in *Fullilove*. The opinion by Chief Justice Burger announcing the judgment of the Court, 448 U.S. at 487, noted that "application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress." See also the concurring opinion of Justice Powell, at 498 ("[T]he means selected must be narrowly drawn to fulfill the governmental purpose."), and Justice Marshall, at 521 ("[R]acial classifications employed in the set-aside provision are substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination.").

With appropriate limitations, such as were found to exist in both decisions under review herein,¹⁷ race-conscious plans which operate prospectively, and help ensure that the remnants of past discrimination do not continue to haunt the work force, are an essential tool in the Nation's struggle to eradicate employment discrimination. In *Setser v. Norack Investment Co.*, 657 F.2d 962, 966 n.3 (8th Cir. 1981) (en banc), cert. denied, 454 U.S. 1064 (1981), the court, quoting from a 1977 statement by the United States Commission on Civil Rights, provided a

17. See *Vanguards*, 753 F.2d at 484-485, and *Local 638 v. Local 28*, 753 F.2d at 1186-1188, for discussions of how the affirmative action plans in question in each case comply with the guidelines set forth above.

most compelling and persuasive justification for affirmative action:

"The short history of affirmative action programs has shown such programs to be promising instruments in obtaining equality of opportunity. Many thousands of people have been afforded opportunities to develop their talents fully—opportunities that would not have been available without affirmative action. The emerging cadre of able minority and women lawyers, doctors, construction workers, and office managers is testimony to the fact that when opportunities are provided they will be used to the fullest.

"While the effort often poses hard choices, courts and public agencies have shown themselves to be sensitive to the need to protect the legitimate interests and expectations of white workers and students and the interests of employers and universities in preserving systems based on merit. While all problems have not been resolved, the means are at hand to create employment and education systems that are fair to all people.

"It would be a tragedy if this nation repeated the error that was made a century ago. If we do not lose our nerve and commitment and if we call upon the reservoir of good will that exists in this nation, affirmative action programs will help us to reach the day when our society is truly colorblind and nonsexist because all people will have an equal opportunity to develop their full potential and to share in the effort and the rewards that such development brings."

United States Comm. on Civil Rights, Statement on Affirmative Action, 12 (1977)."

These words eloquently describe the importance of a decision from this Court affirming the use of bona fide affirmative action plans, in appropriate situations, to accomplish the goal of eliminating the effects of past discrimination.

CONCLUSION

Race-conscious affirmative action plans designed to eliminate the vestiges of racial discrimination in employment are an effective and necessary means to achieve the goal of equal employment opportunity. Such plans are consistent with the remedial purpose of Title VII, and pass scrutiny under equal protection guarantees, so long as they are carefully designed to remedy past discrimination. For the foregoing reasons, amici respectfully urge this Court to affirm the decisions below.

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Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

ANDREA SHERIDAN ORDEN
Chief Assistant Attorney General
MARLAN M. JOHNSTON
Deputy Attorney General